Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-138

DAVID P. WEINBERGER, ESQ., *pro se*,
Petitioner,

versus

FLORIDA DEPARTMENT OF COMMERCE,
Respondent.

DAVID P. WEINBERGER, ESQ., *pro se*,
Petitioner,

versus

E. J. TROMBETTA, J. W. WHITE, SHELTON KEMP, ANN TODD, G. W. STUBBS, L. Y. PONDER, G. L. FOX and T. J. DOWDELL, JR.,
Respondents.

DAVID P. WEINBERGER, ESQ., *pro se*,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OVERVIEW OF COMBINED PETITION

This petition for certiorari covers three cases which were separately filed in the United States District Court for the Southern District of Florida, and individually appealed to the United States Fifth Circuit Court of Appeals, though they arise from the same incident. Separation of the cases below was an attempt to aid judicial analysis by not combining various causes of action against different defendants in one suit. The purpose of combining the three dispositions below in one petition is an attempt to bring to this Court's attention the alarming state of civil justice in the lower federal courts. The petition for each case is separate, except that essentially one statement of facts has been furnished for all three cases, and one issue common to all of these actions has been set out. This index is an overview of the combined petition; local indexes to each case appear before the prescribed materials for that case.

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Trial court docket #	USDC SD Fla. #76-3-Civ-JE	USDC SD Fla. #76-200-Civ-CA	USDC SD Fla. #76-1303-Civ-CA
Appeal court docket #	USCCA5 #76-2981 (note 1, below)	USCCA5 #76-3276 (note 2, below)	USCCA5 #76-4365 (note 3, below)
Amended Complaint Filed	Mar. 22, 1976 (note 8, below)	Mar. 30, 1976 (note 8, below)	Sept. 16, 1976 (note 9, below)
Entry of Dismissal Order Appealed (note 4, below)	May 20, 1976 (1¼ page memo opinion)	June 30, 1976 (note 5, below)	Sept. 30, 1976 (note 6, below)
Date of Assignment to USCCA5 Summary Calendar	March 21, 1977	March 24, 1977	June 24, 1977
Entry of Affirmance Order	March 29, 1977 (note 7, below)	Apr. 1, 1977 (note 7, below)	*(petitioner now expects this during printing of this petition)*
Entry of Order Denying Rehearing	Apr. 29, 1977	May 24, 1977	*(petitioner plans to file for rehearing and rehearing en banc notwithstanding this petition)*

Note 1: *Weinberger v. Fla. Dept. of Commerce* ["federal question", 28 U.S.C. § 1331, and civil rights jurisdiction, 28 U.S.C. § 1343(3)/42 U.S.C. § 2000d]

Note 2: *Weinberger v. Trombetta et al.* ["federal question", 28 U.S.C. § 1331, and civil rights jurisdiction, 28 U.S.C. § 1343/42 U.S.C. §§ 1983, 1985, 1986 and 2000d]

Note 3: *Weinberger v. United States* [jurisdiction under 28 U.S.C. §§ 1346(b) and 2671 *et seq.* (Federal Tort Claims Act)]

Note 4: All three trial court dismissals appear to be unpublished decisions.

Note 5: Dismissal without opinion or reason for grant of defendants' motion to dismiss.

Note 6: Dismissal on mutually-exclusive grounds of lack of jurisdiction of subject matter and failure to state a federal claim. See USCCA5 #76-4365, Appendix at p. 51, Record at p. 67 and *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, 1946.

Note 7: *Per curiam* summary affirmances under USCCA5 Local Rule 21, apparently unpublished.

Note 8: Original complaints dismissed by same trial judge with leave to amend, presumably for failure to comply with Federal Rules of Civil Procedure.

Note 9: Amended once as of right, Fed.R.Civ.P. Rule 15(a).

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted by:

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

DAVID P. WEINBERGER, ESQ., *pro se*,
Petitioner,

versus

STATE OF FLORIDA,
DEPARTMENT OF COMMERCE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered on March 29, 1977 in the case styled *David P. Weinberger, Plaintiff-Appellant, v. Florida Department of Commerce, Defendant-Appellee*, USCCA5 Docket No. 76-2981, on an appeal from the United States District Court for the Southern District of Florida, Miami Division, Civil Action # 76-3-Civ-JE.

OPINIONS BELOW

In a *per curiam* decision pursuant to its Local Rule 21, the Court of Appeals summarily affirmed the memorandum opinion of the United States District Court for the Southern District of Florida, Miami Division, granting defendant's motion to dismiss. Both decisions are [apparently] unpublished, and appear herein as Appendix A (pp. 1A-4A). The denial of appellant's timely petition for rehearing and suggestion of rehearing *en banc* by the Fifth Circuit Court of Appeals appears herewith in Appendix A (pp. 5A-6A).

JURISDICTION

The jurisdiction of this Court is sought to be invoked pursuant to Title 28, United States Code, Sections 1254(1) and 2101(c), and in accordance with Rules 19, 21, 22 and 23 of this Court. The decision of the Court of Appeals was entered on March 29, 1977. A seasonable petition for rehearing was filed, and denied by a Court of Appeals order entered on April 29, 1977.

QUESTIONS PRESENTED

I.

WHETHER THE STATE OF FLORIDA WAIVED ELEVENTH AMENDMENT IMMUNITY BY CERTIFICATION MADE TO THE UNITED STATES UNDER FEDERAL REGULATIONS [20 C.F.R. § 601.3(a)] IMPLEMENTING A STATUTORY REQUIREMENT FOR MERIT SYSTEM METHODS OF PERSONNEL ADMINISTRATION [42 U.S.C. § 503 (a)(1), (b)(2)] TO OBTAIN ASSISTANCE IN A PROGRAM OF

PARAMOUNT NATIONAL INTEREST, OR HAS OTHERWISE CONSENTED TO SUIT IN FEDERAL COURTS WHEN FLORIDA HAS:

(A) MADE PROVISION IN ITS PRESENT CONSTITUTION [1968 Constitution of Florida, Article X, Section 13] AND EARLIER ORGANIC LAW FOR THE BRINGING OF SUITS AGAINST THE STATE IN ACCORDANCE WITH GENERAL LAW;

(B) ENACTED A TORT CLAIMS ACT [Fla.Stats. Ch. 768.28] WHICH DOES NOT DISPLAY ANY INTENT TO LIMIT SUITS TO ITS OWN COURTS, WITH LEGISLATIVE KNOWLEDGE (from Fla.Stats. Ch. 16.05) THAT A PRIOR, SIMILARLY-WORDED ENACTMENT [Fla.Stats. Ch. 768.15] HAD BEEN HELD IN *Kiesel v. Fla. Dept. of Natural Resources*, 479 F.2d 1261 (CA5, 1973) TO SUBJECT THAT STATE TO CIVIL DAMAGE ACTIONS IN FEDERAL COURTS;

(C) AUTHORIZED ITS ATTORNEY GENERAL *BY GENERAL LAW* (Fla.Stats. Ch. 16.01) TO REPRESENT THE STATE IN ALL FEDERAL COURT SUITS TO WHICH FLORIDA IS A PARTY;

(D) *BY GENERAL LAW* AUTHORIZED THE ENGAGEMENT OF OTHER COUNSEL TO REPRESENT THE STATE (Fla.Stats. Chs. 20.11, 284.35) UNDER NO MORE RESTRICTION THAN IS IMPOSED UPON ITS AT-

TORNEY GENERAL IN REGARD TO FORUMS IN WHICH SUCH COUNSEL MAY APPEAR; and

(E) PERMITTED A SUPERVISORY EMPLOYEE TO FURNISH AN AFFIDAVIT AS TO DISPUTED FACTS IN DEFENDING A SUIT FOR DAMAGES IN A FEDERAL DISTRICT COURT.

II.

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS HAS ABUSED ITS DISCRETION TO SUMMARILY AFFIRM WITHOUT OPINION A DISMISSAL BELOW UNDER ITS LOCAL RULE 21 WHEN:

(A) THE QUESTION AS TO AMENABILITY OF FLORIDA TO SUITS IN FEDERAL COURTS UNDER A NEW STATUTE WAIVING IMMUNITY (Fla.Stats. Ch. 768.28) WAS ONE OF FIRST IMPRESSION HAVING PRECEDENTIAL VALUE, PARTICULARLY WHERE THAT COURT OF APPEALS HAD HELD THE STATE SUBJECT TO SUCH SUITS UNDER A SIMILARLY WORDED, PRIOR STATUTE [Fla.Stats. Ch. 768.15; *Kiesel v. Fla. Dept. of Natural Resources*, 479 F.2d 1261 (CA5, 1973)];

(B) THE COURT OF APPEALS EXPRESSED NO VIEW ON APPELLANT'S ARGUMENTS THAT FLORIDA CONSTITUTIONAL AND GENERAL LAW [1968 Constitution of Florida, Article X, Section 13; Fla.Stats. Chs. 16.01, 16.05, 20.11, 284.35, 284.38] CONSTITUTED AN

AUTHORIZATION FOR DAMAGE SUITS AGAINST THE STATE IN FEDERAL COURTS;

(C) THE COURT OF APPEALS EXPRESSED NO VIEW ON APPELLANT'S ARGUMENT THAT THE OVERT ACT OF CERTIFICATION BY FLORIDA UNDER FEDERAL REGULATIONS [20 C.F.R. § 601.3(a)] DISTINGUISHED THIS CASE FROM THE 'MERE INVOLVEMENT' OF A STATE IN A FEDERALLY-ASSISTED PROGRAM FOUND IN *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, 1974;

(D) NON-MONETARY RELIEF NOT BARRED BY THE ELEVENTH AMENDMENT WAS (1) REQUESTED BY THE COMPLAINT AS LAST AMENDED, (2) IGNORED BY THE TRIAL COURT, and (3) RAISED AS A POINT IN APPELLANT'S BRIEF TO THE COURT OF APPEALS;

(E) THE PANEL ISSUING SUCH *PER CURIAM* AFFIRMANCE INCLUDED A NEWLY-ELEVATED CIRCUIT JUDGE WHO HAD (1) VERY SHORTLY BEFORE BEEN A TRIAL JUDGE IN THE DIVISION AND DISTRICT OF DISMISSAL(S), (2) WARNED THE PUBLIC THAT BECAUSE OF CASELOADS ON JUDGES AND THE PRESS OF CRIMINAL CALENDAR BUSINESS THERE CIVIL ACTIONS WERE NOT LIKELY TO BE HEARD UNLESS ADDITIONAL JUDGES WERE APPOINTED, (3) ENTERED THE PANEL'S DENIAL OF A SEASONABLE PETITION FOR

REHEARING, and (4) DECLINED TO RECUSE HIMSELF UNDER THE OBJECTIVE STANDARD OF 28 U.S.C. § 455(a) IN THIS AND RELATED CASES [Appendix A, pp. 7A-9A]; and

(F) THE DISTRICT COURT'S DISMISSAL OF THIS SUIT FOR FAILURE TO STATE A FEDERAL CLAIM POINTED TO THE POSSIBILITY OF A STATE COURT SUIT UNDER THE FLORIDA TORT CLAIMS ACT YET DISMISSED THE AMENDED COMPLAINT WITH PREJUDICE, AND THE APPELLATE BRIEF REQUESTED AS ALTERNATIVE RELIEF REMOVAL OF PREJUDICE TO FACILITATE PURSUIT OF A REMEDY IN FLORIDA COURTS.

III.

(This issue is reached here if Florida is held subject to damage suits in federal courts; it is common to the related cases, USCCA5 Nos. 76-3278 and 76-4365).

IN A FEDERALLY-AIDED PROGRAM *REQUIRING*, AS A CONDITION OF ASSISTANCE, CERTIFICATIONS BY FLORIDA TO THE UNITED STATES REGARDING FLORIDA PERSONNEL RULES REVIEWED AND APPROVED BY THE U.S. CIVIL SERVICE COMMISSION,

WHETHER AN EMPLOYEE DISCHARGED IN VIOLATION OF THOSE RULES POSSESSES A LEGALLY-COGNIZABLE CAUSE OF ACTION AGAINST THE STATE

OF FLORIDA UNDER THE FOURTEENTH AMENDMENT OR TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, OR, IF NOT, ON A THIRD PARTY BENEFICIARY THEORY OR OTHER BASIS UNDER THE SOCIAL SECURITY ACT AMENDMENT OF 1939 REQUIRING SUCH MERIT SYSTEM STANDARDS OF PERSONNEL ADMINISTRATION OR UNDER APPLICABLE PORTIONS OF THE INTERGOVERNMENTAL PERSONNEL ACT OF 1970, OR A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST OFFICERS AND EMPLOYEES OF THE STATE UNDER FEDERAL CIVIL RIGHTS ACTS [42 U.S.C. §§ 1983, 1985, 1986, 2000d).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES INVOLVED:

[Appendix B]

Local Rule 21, United States Fifth Circuit Court of Appeals;

United States Constitution, Amendment XIV, Section 1; Amendments I, XI;

1968 Constitution of Florida, Article X, Section 13;

Florida Statutes, Chapter 768.28 [Waiver of Sovereign Immunity in Tort Actions]; Chapters 16.01, 16.05, 20.11 [duties of Attorney General, and Department of Legal Affairs]; Chapters 284.35 and 284.38 [administrative personnel/expenses; and waiver of sovereign immunity in re Florida Risk Management Trust Fund operations];

Title 42, United States Code, Section 503(a)(1), 503(b)(2) [Social Security Act Amendments of 1939]; Sections 4701, 4702, 4728(a)(2)(B) [Intergovernmental Personnel Act of 1970]; Section 2000d (Title VI, Civil Rights Act of 1964];

Title 20, Code of Federal Regulations, Part 601, Subpart A [Approval, Certification and Findings With Respect to State Laws and Plans of Operation for Normal and Additional Tax Credit and Grant Purposes], §§ 601.1, 601.2, 601.3;

Title 45, Code of Federal Regulations, Part 70 [Standards for a Merit System of Personnel Administration], § 70.1;

Title 29, Code of Federal Regulations, Part 31 [Nondiscrimination in federally-assisted programs of the Department of Labor — effectuation of Title VI of the Civil Rights Act of 1964], § 31.1.

[Appendix D]

Title 28, United States Code, Sections 455(a), 1331, 1343.

[Petitioner has requested certification of the record to this Court. Applicable Florida personnel rules are found at pp. 101 to 111 of the record.]

STATEMENT OF THE CASE

This case is one of three separate civil actions filed on the same facts in the Miami Division of the U.S. District Court for the Southern District of Florida. The related cases were brought against eight officers and employees of the Florida Department of Commerce [USCCA5 #76-3278] under federal civil rights statutes

[42 U.S.C. §§ 1983, 1985, 1986, 2000d] and against the United States [USCCA5 #76-4365] under the Federal Tort Claims Act [28 U.S.C. § 2671 *et seq.*]. Each suit was dismissed on motion and separately appealed to the United States Fifth Circuit Court of Appeals.

This suit is a civil damage action brought on "federal question" [28 U.S.C. § 1331] and civil rights [28 U.S.C. § 1343(3)] bases by a discharged state employee, an attorney, under Florida constitutional and general law including a tort claims act and statutes governing defense of suits against that State, the Fourteenth and First Amendment to the U.S. Constitution, and applicable federal statutes and regulations on intergovernmental personnel administration requirements. The offer of employment accepted by petitioner read in part:

> ". . . The incumbent will be on a probationary basis for six months and at that time the decision will be made as to whether the incumbent shall become a permanent employee. This is in accordance with the State Personnel Rules . . ." USCCA5 #76-2981, Exhibit I, Record at p. 90, Appendix at p. 21; USCCA5 #76-3278, Exhibit I, Record at p. 82, Appendix at p. 42.

Those state personnel rules, approved by the U.S. Civil Service Commission and certified by Florida to the U.S. Department of Labor to obtain funds, implement the federal statutory requirement for merit systems of personnel administration. 42 U.S.C. § 503. Petitioner's position on an examination register required that he be extended an offer of employment, a fact he did not appreciate when accepting the tendered employment.

The contentions are that Florida's rules were not observed in petitioner's termination, that his ouster was a reprisal for reasonable exercise of First Amendment rights and attempted exercise of lawful grievance procedure, and that he was discharged before completion of the offered six-month probationary period to make way for a transferred or laid-off, tenured state employee of Hispanic descent — even though facility in the Spanish language was not a position requirement (but was admittedly a decided advantage in South Florida).

Petitioner's superiors never claimed he was guilty of misconduct. USCCA5 #76-2981, Exhibit X, Record at p. 96, Appendix at p. 27; USCCA5 #76-3278, Exhibit X, Record at p. 87, Appendix at p. 47. Under color of state law, however, they rated him as incompetent to handle a paralegal position although they had never prepared a performance evaluation of his work in accordance with Florida Department of Commerce procedure authorized by that State's certified personnel rules, to implement them. Two memoranda purporting to be evaluations of petitioner's work were uninitialed and unsigned, done in his proper absences so as to deprive him of a required discussion with the supervisor making them, and an opportunity which is allowed an employee to object to his ratings. These 'evaluations' did not employ nine objective criteria which are specified by Florida Department of Commerce procedure under state personnel rules for all employees, whether in tenured status or not. It was alternatively alleged in petitioner's personnel file, a public record available for inspection under Florida law, that he was 'incapacitated' although there was no supporting examination report. Such an examination

report, if it existed, would have had to be part of the petitioner's personnel file under Florida administrative rules. In records of the Florida Department of Commerce, petitioner was given credit for nearly 2½ times as many written (Florida) decisions in his last month on the payroll, in only 1/3 the number of working days, compared to the previous month — a 750% increase in performance! USCCA5 #76-2981, Exhibit XXXV, Record at p. 132, Appendix at p. 63, compared to Exhibit XXXIII, Record at p. 130, Appendix at p. 61; USCCA5 #76-3278, Exhibit XXXV, Record at p. 125, Appendix at p. 85, compared to Exhibit XXXIII, Record at p. 123, Appendix at p. 83.

Shortly before his termination, petitioner's protest over working conditions at a training session led to an immediate relocation in more suitable quarters. Petitioner was immediately discharged upon his acknowledgement of requested grievance forms, by which he planned to allege that state personnel rules were being violated (as is specifically permitted by those rules). An exit interview required by those rules was never held. The amended complaints were accompanied by documents in support of First Amendment claims. USCCA5 #76-2981, Exhibits IV, VI, VII and VIII at Record pp. 92-94, Appendix pp. 23-25; USCCA5 #76-3278, Exhibits IV, VI, VII and VIII at Record pp. 84-86, Appendix at pp. 44-46.

Petitioner did not learn until after his removal from the Florida payroll, while inspecting his personnel file at Tallahassee, that unknown persons for unspecified reasons had made an unlimited recommendation against reemployment, sans hearing. Nor did he know until after removal that one month following

the commencement of his employment by the state, the U.S. Department of Labor published its Audit Report #04-75-044-L, which concluded that the Florida Department of Commerce was incapable of administering the merit system of personnel administration required by federal statutory law and certified by Florida under federal regulations, to obtain funds. This conclusion was based on numerous violations of state and federal law found in the period from mid-1969 through mid-1973. Yet federal aid to the Florida Department of Commerce continued without interruption, and apparently even a threat of being halted, for FDC's failure to comply with the requirements of 42 U.S.C. § 503(a)(1), as is mandated by 42 U.S.C. § 503(b)(2). Petitioner contends that the Government set the stage for his injury by not insisting upon required standards before he was employed, that the Government had no discretion to continue funding to FDC in the face of documented compliance failures, that the Government owed him and persons similarly situated a duty as intended though not principal beneficiaries of the merit system requirement, and that the Government was dilatory and negligent in taking so long to report on non-compliance by the Florida Department of Commerce.

REASONS WITHIN RULE 19 OF THIS COURT FOR ALLOWANCE OF THE WRIT.

A. The Court Of Appeals Has, By A Summary Affirmance, Decided Important Questions Of Federal Constitutional And Statutory Law Which Have Not Been, But Should Be, Decided By This Court.

The affirmance without opinion of the trial court's dismissal does not clearly reveal whether the Court of

Appeals sustained it on the ground of lack of jurisdiction of subject matter, or for failure to state a federal claim. These are mutually exclusive grounds. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, 1946. Since the claim is grounded upon the First and Fourteenth Amendments to the United States Constitution [Section 1 of the latter], jurisdiction of subject matter should be found unless the 1st and 14th Amendment claims are patently insubstantial and made only to invoke federal jurisdiction. Petitioner contends that the pleaded interests in property (a six-month trial period of employment as stated in the offer letter sent to him) and liberty (allegations of incapacity without a supporting examination report, or incompetence unsupported by a lawful performance evaluation) are well within the substantive guidelines for federal jurisdiction set forth in *Hagans v. Lavine*, 415 U.S. 528, 536-8, 94 S.Ct. 1372, 1378-1380, 39 L.Ed.2d 577, 1974. The allegations of incompetence or incapacity were made in a public document under Florida law, petitioner's personnel file. Since a monetary claim can be founded on the Fourteenth Amendment, *Jordon v. Gilligan*, 500 F.2d 701 (CA 6, 1974), *cert. den.* 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481, it appears that the Fifth Circuit Court of Appeals sustained the dismissal below on Eleventh Amendment immunity. This should not have been done under that court's local rule on affirmances without opinion because: (1) an important question of Constitutional law [waiver or consent of the State of Florida to be sued for pecuniary damages in a federal court], (2) a vital matter bearing on the extent of federal judicial power, and (3) a significant issue of statutory law [applicability of Title VI, Civil Rights Act of 1964 to a state agency], have been decided which have not been resolved by this Court, but should be.

The Eleventh Amendment issue presented by this case is not governed by the holding of this Court in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, 1974, that 'mere involvement' in a federally-assisted program does not effect a (constructive) waiver of Eleventh Amendment immunity. This is so because the instant case involves certifications by Florida to the United States in order to obtain federal funds and tax credits for employers within its boundaries against levies due under the Federal Unemployment Tax Act, 26 U.S.C. § 3301 *et seq*. See Title 20, Code of Federal Regulations, §§ 601.2(a), 601.3(a), Appendix B. Petitioner's principal brief on appeal in this cause traced in careful detail at page 54 the applicable federal regulations in *Edelman, supra*, to show that certifications by the State of Illinois were not there involved as here. At page 56 of that brief submitted to the Fifth Circuit, petitioner showed that at the time of the events in question in *Edelman* there was no provision in the Illinois constitution allowing for suits against the state (but that subsequently when the Illinois constitution was modified, that State made it plain its own Court of Claims was the intended forum for all suits against it). In Florida the present constitutional provision for suit against that State dates back to 1885, and such provision first appeared in 1868. 26A Fla.Stats.Ann. 530 (commentary). State constitutional law on the subject of consent to suit is not self-executing. *Palmer v. Ohio*, 248 U.S. 32, 39, 63 S.Ct. 16, 63 L.Ed. 108, 1918. It is the petitioner's contention that general law of Florida exhibits, in a variety of ways, a legislative intent that the State be answerable in federal as well as its own courts. Petitioner has been unable to find *any* Florida statute exhibiting a specific intent to exclude federal courts as forums for suits

against the State or its agencies, regardless of subject matter. At page 47 of petitioner's principal brief on appeal to the Fifth Circuit, the Florida statute providing for suit against that State's transportation department [Fla.Stats. Ch. 337.19(3)] was cited to show that even there the legislature did not insist upon limiting judicial forums to the *state* courts of the county or counties in which the cause of action arose, or of Leon County (the seat of State government).

The trial court dismissed the amended complaint less than 2 months after it was served. This was half of the median time in months from filing time to disposition for the Southern District of Florida. [See "Management Statistics for United States Courts, 1976," at p. 52. The Southern District of Florida racked up the shortest median time in months from filing to disposition not only in its circuit but in the entire country. Id.] During this short two month period, petitioner's efforts to fully develop the reasons why the present waiver of immunity statute, Fla.Stats. Ch. 768.28 [Appendix B], should subject the State to federal jurisdiction over a claim for monetary damages was further hampered by a death in his immediate family. For these reasons, and due to the public interest in whether Florida is subject to federal court damage suits, the discussion of the statutory duties of Florida's Attorney General [Fla. Stats. Chs. 16.01, 16.05, 20.11, Appendix B] and (lack of) statutory limitations on substitute counsel [Fla.Stats. Ch. 284.35, 284.38, Appendix B] should not be viewed as a change in the legal theory of Florida's liability, but supportive and expository thereof. As intimated by

the district judge who held Florida subject to federal jurisdiction under its prior tort claims act, *infra* at pp. 24-25, when enacting the current waiver statute [Fla.Stats. Ch. 768.28, Appendix B] the Florida legislature could easily have qualified the phrase "court of appropriate jurisdiction" by using three prefatory words: 'circuit or county,' particularly when it had reason to know from Fla.Stats. Ch. 16.05 [Appendix B] how its prior words in Fla. Stats. Ch. 768.15 had been interpreted by the Fifth Circuit Court of Appeals in *Kiesel v. Fla. Dept. of Natural Resources*, 479 F.2d 1261 (CA5, 1973). Interpretation of the duties of Florida's Attorney General by the State Supreme Court in *Holland v. Watson*, 153 Fla. 178, 14 So.2d 200 (1943) is appropriate here:

> "Under the common law, the Attorney General was the chief law officer of the State and his duties were varied and numerous . . . We inherited the common law from England but it has experienced many inflections in this country because of . . . our dual sovereignty *necessitating a federal and a state aspect of the office of Attorney General* (emphasis supplied) . . . It is not generally conceded that the only safe determinor of his duties and prerogatives is to resort to the statutory and constitutional provisions of the State defining them . . . Summarized . . . the Constitution . . . clothes him with 'such other legal duties as may be prescribed by law.' Section 16.01, Florida Statutes . . . was designed to embrace 'such other duties as may be prescribed by law.' " (This phrase is used in Article IV, Section 4(a), 1968 Florida Constitution.)

This case presents a fairly debatable question of Eleventh Amendment waiver by Florida or its consent to being answerable to damage actions in federal courts. If sufficiently substantial Constitutional claims are made, it is not at all clear why the district court and the court of appeals do not consider themselves "courts of appropriate jurisdiction" where (1) Florida has failed to use all opportunities to qualify the forums in which it consents to be answerable, (2) Florida has been engaged in the overt acts of making certifications to the United States to obtain federal support, and (3) Florida has gone beyond simply making a general appearance in federal court, but has submitted an affidavit in regard to a disputed issue of material fact. [See USCCA5 #76-2981, Record at p. 211, Appendix at p. 91.] "Jurisdiction over federal causes, whether Constitutional or otherwise, is vested, exclusively or concurrently, in the federal district courts." *Rosado v. Wyman*, 397 U.S. 397, 403, 90 S.Ct. 1207, 1212, 25 L.Ed.2d 442, 1970. If the courts below are relegating individuals claiming infringement of their First or Fourteenth Amendment rights by a state to state courts due to the press of criminal matters in the federal courts, that decision would be of such major Constitutional proportions as to be in desperate need of review by this Court, and not only for this petitioner's relief. [It is significant to note that for FY 1976, the Fifth Circuit had the highest number of total appeals, the highest number of criminal appeals and the highest number of appeals terminated after hearing or submission, per judgeship, of any federal circuit court of appeals for that period. It was the second ranking circuit then for total number of prisoner appeals per judgeship.]

The amended complaint sought relief not barred by Eleventh Amendment immunity: protective jurisdiction of a federal court over federal funds in view of Florida's compliance failures (Count 7, Appendix at p. 20, Record at p. 87, USCCA5 #76-2981). This was ignored by both the district court and the court of appeals though it was sought on the basis of U.S. Labor Department Audit Report #04-75-044-L which concluded on Feb. 28, 1975 at p. 7 that

> "based on personnel violations contained in this report, the management of the agency [respondent] is inadequate to administer a merit system for agency personnel. As a result of certain practices both state and federal laws were violated."

Petitioner did not lack standing to seek this relief if, as alleged, he was injured by continued violations of law by respondent. This Court should therefore decide why the protective jurisdiction of a federal court is not available when violations of a federal statute [42 U.S.C. § 503] have been established by the Government itself, and it has not been shown that the pattern of violations has ceased.

The trial court may have attempted resort to ". . . the ordinary rule that a federal court should not decide federal Constitutional questions where a dispositive non-Constitutional ground is available . . . ," *Hagans v. Lavine*, 415 U.S. 528, 548, 94 S.Ct. 1372, 1384, 39 L.Ed.2d 577, 1974, by intimating that a state agency is not subject to 42 U.S.C. § 2000d because it is not a "person" within the meaning of 42 U.S.C. § 1983. Order of Dismissal, last paragraph of first page, USCCA5 #76-

2981, Record at p. 235, Appendix at p. 93. If so, this is a substantial federal question which, to petitioner's knowledge, has not been so decided by any other federal court or by this Court.

B. The Court Of Appeals Has Rendered A Decision In Conflict With The Decision Of Another Court Of Appeals On The Same Matter.

Waiver of Eleventh Amendment immunity was found in *Vargas v. Trainor*, 508 F.2d 485 (CA7, 1974), *motion granted*, 420 U.S. 988, 95 S.Ct. 1421, 43 L.Ed.2d 669, *cert. den.* 430 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767 (March 31, 1976), also involving the State of Illinois as did *Edelman v. Jordan, supra* at p. 15. In *Vargas v. Trainor*, when opposing the motion of plaintiff-appellants for an injunction the Attorney General of Illinois represented to the Seventh Circuit Court of Appeals that no harm would result to them if it was denied and they were later successful on the merits of a controversy over welfare payments. The State of Illinois opposed the motion on the ground that, if it ultimately prevailed, there would be no way to recover payments made during the pendency of the appeal. The Seventh Circuit chose not to rely on the representation and granted the injunction, more for the reason of hardship on the appellants a suspension of their payments would produce even if they prevailed than for any doubt that the representation could later be relied upon. The Seventh Circuit said:

> "A REPRESENTATION MADE IN A JUDICIAL PROCEEDING FOR THE PURPOSE OF INDUCING THE COURT TO ACT OR REFRAIN FROM ACTING SATISFIES

THE REQUIREMENTS STATED IN *Edelman*. We therefore hold that defendant (State of Illinois) has deliberately waived the protection of the Eleventh Amendment." (emphasis added) 508 F.2d at p. 492.

The trial court indicated that respondent's appearance in federal court did not constitute a waiver, in its order of dismissal. The district judge did not however address himself to the effect of the authorized introduction of an affidavit by counsel substituting for the Florida Attorney General, in respect to two of the material issues of the case (the reason for petitioner's dismissal and denial of discriminatory action). This oversight is perpetuated in the summary dismissal by the court of appeals, notwithstanding the fact that it was called to its attention, as was the fact that private counsel substituting for the Attorney General was under no greater restriction than is imposed upon that officer, and he is authorized by general law of Florida to appear in its behalf in federal courts. The Fifth Circuit has effectively decided this case in a way that is contrary to the Seventh Circuit decision in *Vargas v. Trainor, supra*, which this Court did not see fit to disturb shortly after its opinion in *Edelman v. Jordan, supra*.

C. The Court Of Appeals Decided A Federal Question In A Way That Conflicts With An Applicable Decision Of This Court.

In *Gunter v. Atlantic Coast Line Ry.*, 200 U.S. 273, 285-7, 26 S.Ct. 252, 50 L.Ed. 477, 1906, South Carolina statutes authorized its attorney general to "stand in judgment for the state." The wording of Fla.Stats. Ch.

16.01, Appendix B, is not materially different on this matter of law. South Carolina was held amenable to suits in federal court on the strength of the quoted statutory text, and Florida should likewise be subject to such actions. Summary affirmance by the court of appeals provides no discussion on this point of precedential value.

D. The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, And Has So Far Sanctioned Such A Departure By The District Court, As To Call For An Exercise Of This Court's Supervision.

(Three reasons are advanced on this ground for review by this Court. Before the discussion, it should be noted that (*1*) 7 judgeships are authorized for the Southern District of Florida; during FY 1976 there were 9.5 vacant judgeship months, more than in any year since 1970. (*2*) on April 21, 1977 the Senate Judiciary Committee voted to authorize 5 more permanent and 1 temporary judgeships in the Southern District of Florida, and to trim the Fifth Circuit's boundaries by carving an Eleventh Judicial Circuit out of the states of Louisiana and Texas; the newly defined Fifth Circuit would have 14 judges compared with the present 15, (*3*) on or about May 26, 1977 the incumbent national administration proposed legislation to permit federal magistrates to hear civil cases by consent of the parties, and (*4*) in his remarks of March 14, 1977 to the Senate Judiciary Committee, Chief Judge John R. Brown of the Fifth Circuit stated that 53.4% of Fifth Circuit cases are decided without oral argument. of

which 53.2% have Rule 21 opinions issued (summary affirmance without opinion) as was done in this case. Thus, over TWENTY FIVE PERCENT of all Fifth Circuit cases are disposed of without opinion. Petitioner contends that the Fifth Circuit has overstepped the bounds of its wide discretion in the writing of decisions in appeals, by combining its "screening system" which eliminates oral argument with Rule 21 affirmances to decide which civil litigants will be deprived of review of their appeals to make way for criminal appeals. This breakdown in the administration of civil justice in the United States courts cries out for supervisory review by this Court, to assure that the rules of the U.S. District Court for the Southern District of Florida and the Fifth Circuit Court of Appeals which implement criminal justice legislation are not unconstitutional in their application. Petitioner ardently contends that his right of access to federal courts in pressing his own claims and in practicing federal civil law has been seriously impaired.)

1. Appellant's principal brief on appeal at pp. 44-45 clearly showed that the case cited by the district court in dismissing this action, *Williams v. Eaton*, 443 F.2d 422 (CA10, 1971) is inapposite because there a specific intent of that State existed, precluding suits against it outside of its own courts:

> "The Wyoming constitutional provision referred to states that "(s)uits may be brought against the state in such manner and such courts as the legislature may by law direct." Art. I, Section 8, Wyoming Constitution. And the State statutes declare that any action permitted by law against the University Trustees and several other named agencies is "hereby declared to be an action against the State of Wyoming and hereafter no action shall be brought against any of such boards, commissions or trustees *EXCEPT IN THE COURTS OF WYOMING* (emphasis added) and no action shall be maintained against any of such boards, commissions or trustees in any other jurisdiction." Sec. 1-1018, Wyo.Statutes of 1957." *Williams v. Eaton*, 443 F.2d 422, 427 (CA10, 1971).

Obviously a federal court was not a "court of appropriate jurisdiction" in *Williams v. Eaton, supra*, where the State of Wyoming made clear, as it certainly could, that it would not be answerable anywhere but in its own courts. That, however, is not the situation in this case where the Florida legislature has given no clue whatsoever as to what would be a "court of appropriate jurisdiction" for purposes of its present tort claims act, Fla.Stats. Ch. 768.28, Appendix B. Respondent's counsel evidently thought a federal court was one of "appropriate jurisdiction" because the claims themselves were raised in defense rather than the client's Eleventh Amendment immunity.

In ruling on the prior waiver of immunity statute (Fla.Stats. Ch. 768.15), the district judge wrote:

> "Preliminarily, defendants argue that this Court has no jurisdiction to hear the case at bar (a claim in admiralty for money damages), due to the doctrine of sovereign im-

munity. FS Ch. 768.15 provided for waiver of immunity under certain conditions: [recital of FS Ch. 768.15(1)(a), 768.15(2) and 768.15(3) omitted]. Defendants argue that this statute on its face waives sovereign immunity only in the state court and not federal court. Since statutes waiving immunity are to be strictly construed, *State v. Love*, 126 So. 374 (Fla., 1930) and *Kennard v. State Tuberculosis Board of Florida*, 176 So. 872 (Fla., 1937), *defendants contend that the failure of the statute to specifically waive immunity in federal court conclusively shows that there is no jurisdiction in federal court.*

There is no merit to this contention. The statute itself makes no reference to the judicial forum in which the state's sovereign immunity might be waived. IF THE FLORIDA LEGISLATURE HAD INTENDED TO SO LIMIT THE FORUMS IN WHICH THE STATE MIGHT BE SUED, IT COULD EASILY HAVE DONE SO. THE ABSENCE OF ANY SUCH LIMITING PROVISIONS SHOWS THAT THE WAIVER IS EQUALLY VALID IN EITHER FEDERAL OR STATE FORUMS." (emphasis supplied) U.S.D.C., S.D., Fla., Docket No. 71-1393-Civ-JE, Judge Caleb Layton, III; *affirmed*, 479 F.2d 1261 (CA5, 1973).

Between repeal of the former waiver statute, Fla.Stats. Ch. 768.15 and enactment of the current law, Fla.Stats. Ch. 768.28, Appendix B, the Florida legislature was chargeable with knowledge of how its former words were interpreted, because that State's attorney

general had a statutory duty to report on any such interpretation. Fla.Stats. Ch. 16.05, Appendix B. Judge Layton's words are thus even more applicable in this case than in his trial opinion for *Kiesel v. Florida Dept. of Natural Resources, supra*. For these reasons distinguishing this case from *Kiesel* and *Williams v. Eaton, supra*, it is very far from being clear that no error of law occurred below as to permit a summary affirmance under Local Rule 21 of the Fifth Circuit Court of Appeals.

2. Local Rule 21 of the Fifth Circuit Court of Appeals (Appendix B) requires as well a lack of precedential value to warrant use of the summary affirmance procedure. Several precedents are involved in this case, namely: *(1)* it is the first known to petitioner to have been brought before the Fifth Circuit on Florida's current waiver statute, Fla.Stats. Ch. 768.28, Appendix B, and to raise a question of that State's consent to suit in view of the Fifth Circuit's interpretation of the prior waiver law (Fla.Stats. Ch. 768.15) in *Kiesel v. Florida Dept. of Natural Resources*, 479 F.2d 1261 (1973), the statutory duties of Florida's attorney general (Fla.Stats. Chs. 16.01, 16.05, 20.11, Appendix B) and powers of substitute counsel (Fla.Stats. Chs. 284.35, 284.38, Appendix B); *(2)* this case is distinguishable from *Gardner v. Alabama Dept. of Pensions & Security*, 385 F.2d 804 (CA5, 1967), *cert. den.* 389 U.S. 1046, 88 S.Ct. 773, 19 L.Ed.2d 839, wherein "assurances" by a state to the United States did not create a guarantee or give rise to a contract, and from the 'mere participation' in a federally-assisted program found insufficient in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, 1974, to effect a waiver of Eleventh Amendment immunity.

and *(3)* it is the first case known to petitioner since the final decision in *Vargas v. Trainor*, 508 F.2d 485 (CA7, 1974), *cert. den.* March 31, 1976 at 420 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767, to test the proposition of whether a state waives immunity not merely by authorized general appearance but by the subsequent introduction of an affidavit as to disputed, material issues of fact (the reason for petitioner's termination, and the existence of a discriminatory purpose). In short, the Fifth Circuit did not adhere to its own rules in its haste to dispose of this case. This was pointed out in a timely petition for rehearing and suggestion for rehearing *en banc*, but to no avail. Petitioner earnestly contends that these events, taken with the next matter, add up to a performance by the district court and the court of appeals which fails to meet minimum federal jurisprudential standards in a case where an important, precedential matter of law is involved: the suability of a state in federal courts arising from a fact pattern which includes state certifications to the Government to obtain funding and tax credits, and general state law waiving immunity or consenting to suit.

3. One of the circuit judges on the panel which summarily affirmed this case had just ascended the Fifth Circuit bench from the district and division of dismissal (where he still resides). He had been heard to say publicly after becoming a Circuit Judge that dire consequences lay ahead for civil litigants there, if additional judges were not appointed. Miami HERALD, Jan. 14, 1977 at p. 15-C [Appendix, p. 8A]. Thus, from his new position he could urge affirmances of dismissals by his erstwhile, overloaded colleagues. He has declined to recuse himself from this case, Appendix p. 8A, and the related actions,

Appendix p. 9A, under the revised statutory standard of 28 U.S.C. § 455(a), as amended in December, 1974 to conform with changes in the Judicial Canon of Ethics. It is one thing for federal judges to permit civil cases to languish because they are overloaded with the press of criminal docket affairs. It is quite another thing however for them to publicly warn civil litigants that their cases will not be heard unless Congress grants some relief through additional appointments to the bench. That one of these judges did so after assuming the position from which he could have a hand in upholding quick dismissals below destroys any confidence law-abiding citizens can have in the administration of civil justice by both the Miami Division of the Southern District of Florida and by the Fifth Circuit Court of Appeals. These departures are urged to be such as to warrant the exercise of this Court's inherent powers of supervision over inferior federal courts.

CONCLUSION

Although the phrase "court of appropriate jurisdiction" appears in both this case and *Williams v. Eaton*, *supra* at pp. 23-26, the trial court erred in predicating this dismissal on that case because of the presence there and absence here of a specific legislative intent to restrict suits against the state to its own forums. The Court of Appeals erred in applying its local rule on summary affirmance without opinion (Rule 21, Appendix B) because of this error of law, and as well because this case has precedential value, at least as the first which could be reported under the present, new Florida waiver of immunity statute (Fla.Stats. Ch. 768.28, Appendix B) if not the first case in the

federal courts as to the effect of certifications by a state to the United States to obtain fiscal grants. Unlike the previous waiver statute, Fla.Stats. Ch. 768.15, the present Florida statute waiving immunity limits that State's liability in terms of the size of a monetary judgement which can be entered against it in a court of law. Under these circumstances, the State of Florida cannot suffer a larger judgement in a federal court than it could in one of its own judicial forums. Therefore the entire rationale of the Eleventh Amendment, arising as it did following judgement in a federal court against a state in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1793, as protection for the states' treasuries, has no significance here because the Florida legislature has seen fit to effect such protection to its fisc.

The trial court dismissed this case with prejudice although its opinion suggested the possibility of an action in state court. The principal brief on appeal requested removal of any possible prejudice to proceeding in Florida courts, as alternative relief at page 63. In its haste to dispose of this case (seven days between assignment to the summary calendar and issuance of the summary affirmance), the Fifth Circuit Court of Appeals ignored this request entirely.

On any ground proper for grant of certiorari, this case merits the attention of this Court. Taken with the two related cases which follow, petitioner believes a compelling case for the intervention of this Court exists, unless federal courts are now closed to unindicted, uninfluential, law-abiding Americans in order to defer to the rights of criminals, whether drug pushers or sophisticated swindlers. The personal and

professional reputation of an attorney in good standing is at stake in this and the related cases, in ways within the protection of the Constitution and/or statutes of the United States. That is not merely the petitioner's conclusion, but the opinion of this Court as well:

> ". . . (A) state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. *Connell v. Higginbotham*, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971); *Wiemann v. Updegraff*, 344 U.S. 183, 191-2, 73 S.Ct. 215, 218-9, 97 L.Ed. 216 (1952); *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), 164, 94 S.Ct. 1649 (Powell, J., concurring), 171, 94 S.Ct. 1652 (White, J., concurring and dissenting)." White, J., *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 735, 42 L.Ed.2d 725 (1975).

David P. Weinberger

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

DAVID P. WEINBERGER, ESQ., *pro se*,
Petitioner,

versus

E. J. TROMBETTA, J. W. WHITE, SHELTON KEMP, ANN TODD, G. W. STUBBS, L. Y. PONDER, G. L. FOX and T. J. DOWDELL, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted by:

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

DAVID P. WEINBERGER, ESQ., *pro se*,
Petitioner,

versus

E. J. TROMBETTA, J. W. WHITE, SHELTON KEMP, ANN TODD, G. W. STUBBS, L. Y. PONDER, G. L. FOX and T. J. DOWDELL, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 1, 1977 in the case styled *David P. Weinberger, Esq., Plaintiff-Appellant v. E. J. Trombetta et al., Defendants-Appellees*, USCCA5 Docket #76-200-Civ-CA.

OPINIONS BELOW

In a *per curiam* decision without opinion pursuant to its Local Rule 21 [Appendix B], the Court of Appeals

summarily affirmed a memorandum dismissal without opinion by the United States District Court for the Southern District of Florida, Miami Division, granting a motion by defendants. Both decisions are [apparently] unpublished, and appear herein as Appendix C (pp. 26A and 27A). The denial of appellant's timely petition for rehearing and suggestion of rehearing *en banc* by the Fifth Circuit Court of Appeals appears in Appendix C herewith, at pp. 29A-30A.

JURISDICTION

The jurisdiction of this Court is sought to be invoked pursuant to Title 28, United States Code, Section 1254(1) and 2101(c), and in accordance with rules 19, 21, 22 and 23 of this Court. The decision of the Court of Appeals was entered on April 1, 1977. A seasonable petition for rehearing was filed, and denied by a Court of Appeals order entered on May 24, 1977.

QUESTIONS PRESENTED

I.

UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871 AS APPLIED TO STATE OFFICERS AND EMPLOYEES ACTING WITH "COLOR OF STATE LAW" *AND* IN A FEDERALLY-AIDED PROGRAM *requiring*, AS A CONDITION OF ASSISTANCE, STATE CERTIFICATIONS TO THE UNITED STATES REGARDING STATE PERSONNEL RULES REVIEWED AND APPROVED BY THE U.S. CIVIL SERVICE COMMISSION,

(A) WHETHER ALLEGATIONS PUBLISHED IN A TERMINATED STATE EMPLOYEE'S PERSONNEL RECORDS THAT HE WAS DISCHARGED FOR INCOMPETENCE OR INCAPACITY, WHICH ARE UNSUPPORTED BY A PERFORMANCE EVALUATION OR ANY EXAMINATION REPORT CALLED FOR BY THOSE RULES, INFRINGES A PROTECTED INTEREST IN LIBERTY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE (1) THE EMPLOYEE'S PERSONNEL FILE IS A PUBLIC RECORD UNDER STATE STATUTES AND JUDICIAL DECISIONS, and (2) NO HEARING ON THOSE ALLEGATIONS WAS AFFORDED THE EMPLOYEE EVEN THOUGH STATE PERSONNEL RULES COMMAND SUPERVISORY PERSONNEL TO DISCUSS A WORKER'S RATING WITH HIM WHEN PREPARING A PERFORMANCE EVALUATION;

(B) WHETHER TERMINATION OF A STATE EMPLOYEE DURING, BUT BEFORE COMPLETION OF, A DILIGENT EFFORT TO ALLEGE BY GRIEVANCE PERMITTED ALL EMPLOYEES UNDER FEDERALLY-APPROVED STATE PERSONNEL RULES THAT SUCH RULES ON PERFORMANCE EVALUATIONS WERE NOT BEING OBSERVED, OR TERMINATION SHORTLY AFTER A JUSTIFIABLE PROTEST OVER WORKING CONDITIONS, INFRINGES AN INTEREST PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES

CONSTITUTION, OR INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN RESPECT TO LIBERTY OR TO PROPERTY IN THE FORM OF CONTINUED PERIOD OF TRIAL EMPLOYMENT ARISING FROM AN EXPLICIT OFFER;

(C) WHETHER DENIAL OF AN EXIT INTERVIEW MANDATED BY STATE PERSONNEL RULES CERTIFIED TO THE FEDERAL GOVERNMENT INFRINGES AN INTEREST PROTECTED BY THE FIRST AMENDMENT, OR AN INTEREST IN LIBERTY FOR DUE PROCESS PURPOSES UNDER THE FOURTEENTH AMENDMENT; and

(D) WHETHER A *de facto* TRIAL TENURE EXISTED FOR PROBATIONARY EMPLOYEES LIKE PETITIONER, IN VIEW OF RARE DISMISSALS FOR INCOMPETENCE PRIOR TO COMPLETION OF THE PROBATIONARY PERIOD.

(The above is a more specific statement of the issue common to all three cases set out as the third question presented in *Weinberger v. Florida Department of Commerce, ante.*)

II.

WHETHER A FEDERAL COURT OF APPEALS HAS ABUSED ITS DISCRETION TO SUMMARILY AFFIRM WITHOUT OPINION A DISMISSAL BELOW WHEN:

(A) THE DISTRICT COURT GAVE NO REASON FOR ITS DISMISSAL OF THIS CASE, SO THAT FOR PURPOSES OF APPLYING LOCAL RULE 21 OF THE FIFTH CIRCUIT COURT OF APPEALS [Appendix B] IT COULD NOT BE SAID THAT ERROR OF LAW BELOW DID NOT APPEAR;

(B) THE RESOLUTION OF THIS CASE IS OF PRECEDENTIAL VALUE FOR A SIGNIFICANT NUMBER OF PERSONS EMPLOYED IN FEDERALLY-SUPPORTED STATE WELFARE PROGRAMS WHICH *require* STATE CERTIFICATIONS TO THE UNITED STATES FOR FEDERAL GRANTS, RATHER THAN BEING A MERE CIVIL RIGHTS ACTION OF IMPORT TO THE COMPLAINANT ONLY, SO THAT LOCAL RULE 21 OF THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS SHOULD NOT HAVE BEEN EMPLOYED TO SUMMARILY AFFIRM WITHOUT OPINION AN UNEXPLAINED DISMISSAL BY THE DISTRICT COURT;

(C) THE FACTS OF THIS CASE ARE MATERIALLY UNLIKE THOSE FOUND IN *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) OR *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 48 L.Ed.2d 811 (1976), SO THAT FOR PURPOSES OF APPLYING LOCAL RULE 21 OF THE FIFTH CIRCUIT COURT OF APPEALS IT COULD NOT BE SAID THAT NO ERROR OF LAW APPEARED IN THE DISTRICT COURT'S UNEXPLAINED DISMISSAL;

(D) THE POSSIBILITY OF THIS CAUSE OF ACTION WAS SUGGESTED IN THE DISTRICT COURT'S DISMISSAL [Appendix A at pp. 2A-3A] OF A RELATED CASE [USCCA5 #76-2981, *ante*]; and

(E) THE JUDICIAL PANEL ISSUING THIS *per curiam* AFFIRMANCE WITHOUT OPINION OF THE TRIAL COURT'S UNEXPLAINED DISMISSAL INCLUDED A NEWLY-ELEVATED CIRCUIT JUDGE WHO HAD (1) VERY SHORTLY BEFORE BEEN A TRIAL JUDGE IN THE DISTRICT AND DIVISION OF DISMISSAL, (2) WARNED THE PUBLIC THERE AFTER BECOMING A RESIDENT CIRCUIT JUDGE THAT CIVIL LITIGANTS WOULD SUFFER IF MORE JUDGES WERE NOT APPOINTED, and (3) TWICE DECLINED TO RECUSE HIMSELF FROM THIS CASE UNDER THE REVISED STATUTORY STANDARD OF 28 U.S.C. § 455(a) [Appendix A, pp. 7A-9A].

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES INVOLVED:

APPENDIX B:

United States Constitution, Amendments I and XIV (Section 1);

Title 42, United States Code, Sections 503, 2000d, 4701;

Title 45, Code of Federal Regulations, Part 70;

Title 20, Code of Federal Regulations, Part 601, Subpart A;

Title 29, Code of Federal Regulations, Part 31;

Local Rule 21, U.S. Fifth Circuit Court of Appeals.

APPENDIX D:

Title 42, United States Code, Sections 1983, 1985 and 1986;

Title 28, United States Code, Sections 455(a), 1331, 1343.

[Petitioner has requested certification of the record to this Court. Applicable Florida personnel rules are found at pp. 93-103 of the record.]

STATEMENT OF THE CASE

This action was brought under "federal question" [28 U.S.C. § 1331] and civil rights [28 U.S.C. § 1343] jurisdictional statutes. The original complaint in this case and the original complaint in the related action, *Weinberger v. Fla. Dept. of Commerce, ante,* were assigned to the same trial judge under the blind filing system in effect at the Miami Division of the U.S. District Court for the Southern District of Florida. He dismissed both cases with leave to amend, ostensibly for reasons of compliance with the Federal Rules of Civil Procedure. The amended complaints in both cases were accompanied by many more relevant and material exhibits, in an effort to reduce the verbiage employed in setting forth claims which are complex in

both fact and law. Subsequent to the filing of the amended complaints, this case was transferred to another trial judge in spite of Local Rule 6.C. of the District Court for the Southern District of Florida:

Rule 6: Transfer of Refiled and Similar Actions and Proceedings:

> . . .C. Similar. Whenever an action or proceeding is filed in the Court which involves subject matter of another action or proceeding then pending before this Court, or for other reasons the disposition thereof would appear to entail unnecessary duplication of judicial labor if heard by a different judge, the judges involved shall determine whether the newly filed action or proceeding should be transferred to the judge to whom the low numbered action or proceeding is assigned."

Both sides moved to vacate the order of transfer, with an alternative request by defendants to consolidate the cases. When the related action, *ante,* was dismissed, defendants withdrew their motion. Petitioner then scheduled a deposition in this case and instituted discovery, and the unexplained dismissal of this case followed. Answers of two of the defendants in this case revealed that on only one other occasion in a number of years did they terminate a probationary employee for "unsatisfactory" work before completion of the probationary period. [Record at pp. 155-158] Prior to filing notice of appeal in the district court, petitioner sought relief from the order of dismissal. This was

refused, also without explanation. Appendix C, p. 27A. In all other material respects, the statement of this case is as set out in *Weinberger v. Florida Department of Commerce, ante,* pp. 9-13.

REASONS WITHIN RULE 19 OF THIS COURT FOR ALLOWANCE OF THE WRIT.

A. The Court Of Appeals Has, By A Summary Affirmance, Decided Important Questions Of Federal Constitutional And Statutory Law Which Have Not Been, But Should Be, Decided By This Court.

Norton v. Blaylock, 409 F.2d 772 (CA8, 1969), is the only other case petitioner can find involving Federal Standards for a Merit System of Personnel Administration [45 C.F.R. Part 70, § 70.1 *et seq.;* see Appendix B]. That case makes no mention of whether the state certifications as to such rules present here [20 C.F.R. § 601.3(a), Appendix B] were required there under US DHEW regulations. While the U.S. Department of Labor requires such certification in connection with unemployment compensation programs of the type here involved, the U.S. Dept. of Health, Education and Welfare seems to have accepted mere assurances by states in some of the programs it administers. The trial court opinion in *Norton v. Blaylock,* 285 F. Supp. 659 (WD Ark. 1968) intimates at page 660 that Federal Standards for Merit Systems of Personnel Administration apply only to permanent employees. Nothing in the legislative history of the Social Security Act Amendments of 1939, which first installed the requirements for such systems, or the Intergovernmental Personnel Act of 1970, which

reiterated such requirements more explicitly, suggests that probationary employees are not entitled to some (though perhaps not all) of the benefits of such standards. This Court should rule on the applicability of Federal Standards for Merit Systems of Personnel Administration to *all* employees of federally-assisted state programs because Congress has found a national interest served by them. 42 U.S.C. § 4701, Appendix B. Such ruling would serve the interests of a wide variety of claimants under federal welfare programs, by assuring that competent probationary employees in federally-aided state programs are not denied tenure for arbitrary or politically-motivated reasons.

This case, apart from being unusual in the respect that a lawyer's *pro se* civil rights/"federal question" suit has been dismissed and affirmed by four federal judges in two courts without the most brief of decisions, presents an opportunity for this Court to explicitly rule on the Constitutional rights of probationary public employees. The claims made relate to due process in respect to both liberty and property, and to First Amendment protections. While probationary employees of the State of Florida are subject to termination without right of administrative appeal to the Florida Career Service Commission under federally-approved state personnel regulations [Ch. 22A-7.03.D., Fla.Admin.Code, Record at p. 94], this should not mean that such termination (as is alleged in this case) can be based upon impermissible grounds. The amended complaint adequately pleads allegations that petitioner's termination was the result of a justifiable protest over training session accommodations (which led to an immediate change)

and a desire to file a lawful grievance. ¶¶VI, XIV, Record pp. 74, 76, supported by Exhibits IV, VI, VII and VIII, Record pp. 84-86; Counts 12 and 18, Record pp. 78, 79. The complaint as amended charged, *inter alia*, injury to petitioner's protected interests in property (an offered period of trial employment) and liberty (statements made as to his competence and capacity in his personnel file, a public record, unsupported by a lawful performance evaluation or a required examination report). ¶¶VII, VIII, Record pp. 74, 75; Counts 6-9 and 11, Record pp. 78. In regard to statements in petitioner's personnel file (a public record) as to his alleged incompetence or incapacity, this case is materially different from *Sims v. Fox*, 505 F.2d 857 (CA5, *en banc*, 1974), *cert. den.* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678, [remarks pertaining to complainant's morals in his personnel file were confidential under Air Force regulations]. On its facts this case is substantially unlike *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 48 L.Ed.2d 811 (1976) [sheriff's handbill on shoplifters did not interfere with privately employed reporter's interest in liberty, absent something more such as loss of employment, where there is no assurance in state law of present enjoyment of reputation].

Because of the requirement of Federal Standards for a Merit System of Personnel Administration in this case, 42 U.S.C. § 503(a)(1), (b)(2), it was also framed as a "federal question" lawsuit. Previously there had not been a judicial determination of whether employees of federally-aided state programs who allege denial of those standards may bring a private action to enforce that requirement. There is evidence that federal administrators have been lax in implementing this

Congressionally-mandated procedure. One case which has come to this Court's attention, *Fusari v. Steinberg*, 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1974), graphically illustrates how the principal intended beneficiaries of merit system standards (the welfare claimants themselves rather than employees situated as petitioner was) suffer when those required standards are ignored. The dismissal by the district court and summary affirmance by the Court of Appeals, both without any explanation, has the effect of deciding that probationary employees in federally-assisted state programs lack Constitutional rights, or that they are not entitled to the protections of Federal Standards for Merit Systems of Personnel Administration — which include "proper regard for their . . . constitutional rights as citizens," 42 U.S.C. § 4701(5) [Appendix B]. Either is a question of sufficient importance for this Court to rule upon, considering the number of employees and claimants who are affected by such a decision, and the serious impact on both classes of persons. In unemployment compensation programs alone, at least fifty jurisdictions certify to the federal Government that merit system standards of personnel administration are in effect, in order to obtain federal grants-in-aid. The effect of such certifications is an important and proper subject for a ruling by this Court which should not be glossed over in unpublished trial and appellate court summary dispositions.

B. The Court Of Appeals Has Rendered A Decision In Conflict With The Decision Of Another Court Of Appeals On The Same Matter.

Calo v. Paine, 521 F.2d 411 (CA2, 1975) held that a probationary public employee may have a claim un-

der 42 U.S.C. § 1983 if his discharge was the result of exercise of First Amendment rights. The complainant in that case was held to be entitled to a full opportunity to prove at an evidentiary hearing his claim that this was the reason for his discharge. This case is all the more significant since it was decided after *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), and the complainant in *Calo, supra*, did not claim the protection of Federal Standards for Merit Systems of Personnel Administration.

C. The Court Of Appeals Decided A Federal Question In A Way That Conflicts With Applicable Decisions Of This Court.

Neither the district court nor the Court of Appeals read the complaint in this case as this Court has directed that civil complaints be read under the Federal Rules of Civil Procedure. Chief Judge John R. Brown of the Fifth Circuit Court of Appeals himself very recently wrote in *Reeves v. City of Jackson, Miss.*, 532 F.2d 491, 494-496 (CA5, 1976) that:

> "(i)n assaying the Trial Court's dismissal of the complaint we say again, as we have many times said (footnote and citations omitted) that under *Conley v. Gibson*, 1957, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 and an almost endless list of our cases that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that plaintiff would not be able to recover under any set of facts which could be proved in

support of his claim." *Cook & Nichol, Inc. v. Plimsoll Club*, 5 Cir., 1971, 451 F.2d 505, 506; see also *Pred v. Board of Public Instruction of Dade County, Fla.*, 5 Cir., 1969, 415 F.2d 851, 853; *Webb v. Standard Oil Company*, 5 Cir., 1969, 414 F.2d 320; *Barber v. Motor Vessel "Blue Cat"*, 5 Cir., 1967, 372 F.2d 626; *Arthur H. Richland Co. v. Harper*, 5 Cir., 1962, 302 F.2d 324; *Millet v. Godchaux Sugars*, 5 Cir., 1957, 241 F.2d 264. [¶] The District Court should give the plaintiff the full fanfare of a federal court claim *at least until it can be seen what the real facts are. If, after a full development of the facts the plaintiff's cause is too weak to string the Constitution's bow or unsheath the sword provided for the redress of such grievances under Mississippi law, it may be washed out on summary judgment* (citation omitted; emphasis added), or if it gets beyond that, by motion for a directed verdict either at the end of the plaintiff's case, or at the close of the evidence, or by J.N.O.V. after verdict (citation omitted) . . . [N]on liability [of the city as a person under 42 U.S.C. § 1983] does not extend to intentional acts by animate officials acting on behalf of the government entity, and if the allegations of the complaint are taken as true, as they must be, these officers . . . intentionally deprived the plaintiff of some of his constitutional rights while performing their official duties. Whether any or all of the individuals have a qualified immunity (citations omitted) . . . cannot at this stage be determined . . . All we hold is that the plaintiff must be afforded the chance to establish facts

upon which his § 1983, § 1331 or diversity claims depend." 532 F.2d 494-496.

In *Pred v. Board of Public Instruction of Dade County, Fla.*, 415 F.2d 851, 854 (CA5, 1969) Judge Brown discussed the effect of *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) in relation to civil rights cases:

> "Under the spirit of the *Conley* reading of a complaint which diminishes, if not altogether obliterates, the restrictive approach of some of our earlier cases (citations omitted) requiring allegation of "facts" as distinguished from "conclusions" in civil rights cases (see footnote 11 below), this complaint is a direct, positive charge that these two teachers, who otherwise would have attained the coveted tenure, were denied a fourth year "continuing contract" solely because of their activities in supporting by word, deed, action and association ideas and lawful movements that were opposed by the State school authorities." 415 F.2d at 854.
>
> 11. This reading wipes out the equally fallacious notion asserted by some cases that allegations of "conspiracy", or the like, to violate civil rights, such as under 42 U.S.C. § 1985, must have the specificity of charges of fraud under Fed.R.Civ.P. Rule 8(a).

Judge Brown further intimated that the Fifth Circuit Court of Appeals is more in sympathy with the dissent

in *Freeman v. Gould Special School District*, 405 F.2d 1153 (CA8, 1969) a case upon which respondents have consistently relied. Footnote 12 at 415 F.2d 854 in *Pred, supra*, suggests that the majority holding in *Freeman* was based on the difficulty or unlikelihood that the complainant's charges could be proved. This is not the test by which a complaint should be tested on a Rule 12(b)(6) motion under the Federal Rules of Civil Procedure. The Court of Appeals did not follow the teaching of this Court's opinion in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), concerning the reading of civil complaints. The lamentable state of the civil dockets in both the Southern District of Florida and in the Fifth Circuit Court of Appeals is not sufficient legal reason to depart from the standards established by this Court in the all-important matter of how civil rights complaints are to be analyzed for purposes of motions to dismiss.

The unexplained dismissal of this action by the district court and summary affirmance thereof without opinion by the Court of Appeals ignores some leading decisions of this Court, including a pair of 1972 and a pair of 1976 civil rights decisions hereinafter analyzed. *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944), *reh.den.* 321 U.S. 804, 64 S.Ct. 778, 88 L.Ed. 1090, held that (1) the element of intentional or purposeful discrimination necessary to establish denial of equal protection of law may appear on the face of the action or by extrinsic evidence, but is not presumed, and (2) the "privileges and immunities" protected by the Fourteenth Amendment are those incident to United States citizenship which arise under federal laws and the national constitution, but are not rights derived solely from the relationship of a citizen to his state

under its laws. The amended complaint was replete with specific allegations of denial of equal protection; the dismissal on motion precluded developing extrinsic evidence if the complaint and supporting exhibits did not make out a *prima facie* case of such denial. The amended complaint did not fail to allege a purposeful discrimination. See ¶XV, Record pp. 76-77. The alleged violations of Florida personnel rules in this case become violations of the "privileges and immunities" clause of the Fourteenth Amendment because those Florida personnel rules fill the federal statutory and regulatory requirements of Federal Standards for Merit Systems of Personnel Administration, where ordinarily mere violation of state rules might not constitute infringement of a state employee's privileges and immunities of national citizenship.

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) held that the lack of a contractual or tenure right to continued employment by itself did not defeat a First Amendment claim, and that a property interest in continued employment for purposes of procedural due process could arise from agency rules or mutually explicit understandings, or be implied from agency conduct. The offered six-month probationary period in this case (see quotation in the Statement of the Case from Exhibit I, Record p. 82, *ante* at p. 5) can hardly be more explicit. It is a representation of the effect of Florida personnel rules made by an experienced administrator/hearing officer. At no time have the respondents in this case ever suggested that such representation was incorrect. Responses by two of the defendant-appellees in the district court (Record at pp. 155-158) show that in only one other instance over a period of many years was a probationer

situated as petitioner discharged for incompetence prior to the completion of a six month trial period. Petitioner contends this pattern of agency conduct amounts to a 'pre-tenure tenure' or a *de facto* tenure within the meaning of *Perry v. Sindermann, supra*. It is also evidence that respondents' employer, the Florida Department of Commerce, maintains a policy of not discharging probationary employees in the absence of good cause. While cause can consist of incompetence or incapacity, where the required procedure for evaluating performance (Florida Department of Commerce Form FDC OPT-6, Exhibit XVI, Record p. 92) was not used or the allegation of incapacity (Exhibit X at Record p. 88) was unsupported by an examination report requird under State personnel rules [Fla.Admin.Code Ch. 22A-11.03A.3., Record p. 100], just cause for removal cannot be found. Respondent White has admitted that the FDC Form OPT-6, with its prescribed criteria for making employee performance evaluations, was applicable to probationary employees. Petition Four, Exhibit XIII, Record p. 90.

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) it was held that a hearing would be required under the Fourteenth Amendment, where a non-tenured teacher's contract was not renewed, only if he could show that the nonrenewal deprived him of an interest in liberty (i.e., charges against the employee, stigma or disability foreclosing other employment) or that he had a "property" interest in continued employment. This case provides all of the ingredients which were lacking in *Roth, supra*. As well as charges of incompetence (which were not supported by a lawful performance

evaluation) or incapacity (when a supporting examination report was lacking), petitioner's personnel file (a public document even after *News Press Publ. Co. dba Ft. Myers Press v. Wisher*, Supreme Court of Florida #47,088, Feb. 25, 1977, 345 So.2d 646) contained an unlimited recommendation against reemployment which was made without a hearing by unknown persons for unspecified reasons. Paragraph VIII, Amended Complaint, Record at p. 75. In offering employment to petitioner, respondents themselves created a reasonable and objective expectation of a six month period of trial employment, and they have conceded that his termination was not based upon misconduct. Exhibit X, Record at p. 87 (page two, last paragraph). The district court and the Court of Appeals should not have dismissed this case for failure to exhaust administrative remedies, because it is well settled that actions brought under 42 U.S.C. §1983 do not require exhaustion of other remedies. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 586, 92 S.Ct. 2701, 2714, 33 L.Ed.2d 548 (1972), cases in footnote 1a to dissent of Mr. Justice Douglas. Even if exhaustion of administrative remedies was required, this petitioner filed the lawful grievance he claims to be one reason for his termination after being notified that he would be discharged. Paragraph VI, Amended Complaint, Record at p. 74. He has also sought review of the entire matter by the Florida Career Service Commission, to no avail.

The circumstances of this case would also furnish all of the ingredients found lacking for a claim under 42 U.S.C. § 1983 in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 48 L.Ed.2d 811 (1976). That case involved a privately employed newspaper reporter who, as com-

plainant, was the subject of a sheriff's handbill on shoplifters. It was held in *Paul v. Davis* that distribution of the flyer complained of did not implicate a liberty or property interest for due process purposes since reputation alone *apart from a more tangible interest such as employment* does not bring either the Fourteenth Amendment or 42 U.S.C. § 1983 into play where mere defamation by a state official may be involved, and where state law did not extend any legal guarantee as to present enjoyment of reputation which may have been infringed by the actions complained of. The instant case involves a loss of employment based on unsupported claims of incompetence or incapacity published in a publicly available file, and a recommendation against reemployment made without notice or hearing. Organic law of Florida does assure present enjoyment of reputation:

> Art. I, Section 2, 1968 Constitution of Florida: *Basic rights:* All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

Respondents' actions have therefore done far more than just defame this petitioner. Those actions have wreaked havoc on petitioner's future employability

and they have cast grave doubts upon his professional and personal reputation by the use of wholly arbitrary, subjective and discriminatory standards. As an example, instead of employing the prescribed criteria for evaluating non-supervisory employees (FDC Form OPT-6, Record at p. 100), petitioner's superiors discharged him and approved his discharge on the basis of a statement by his immediate superior that "(t)he degree of improvement I had hoped for has not been shown." Exhibit VIII at Record p. 94.

The actions of the courts below in this case fly in the face of this Court's holding in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). In that case it was held under a tenable construction of applicable North Carolina law in the absence of a definitive holding by that State's courts that a 'permanent' municipal employee held his position at the will and pleasure of the city, and that reasons for the discharge — even if false — did not impinge on a protected interest in liberty because they were not publicly disclosed. Here just cause is required for an agency head (or his duly appointed delegatee) to terminate an employee. Fla.Admin.Code Ch. 22A-7.10G. ("Dismissals"), Record at p. 104, reads in part:

> 1. A dismissal is defined as the action taken by an agency against an employee to separate the employee from the Career Service.
>
> 2. An agency head may dismiss any employee for just cause. Just cause shall include, but not be limited to, negligence,

> inefficiency, or inability to perform assigned duties; insubordination; . . . misconduct, . . ."

Obviously, *federally-reviewed and approved* Florida personnel rules were not followed by respondents in this case where they cannot point to a performance evaluation done in accordance with those rules to establish petitioner's incompetence, or any examination report substantiating their alternative claim of petitioner's incapacity. Just cause was entirely lacking in this case, particularly where the records respondents themselves created and maintained pointed to a *very* significant increase in petitioner's output during his last month on the payroll. Footnote 8 in *Bishop v. Wood*, 426 U.S. 341, 345, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 684 (1974) suggests the rules in this case are similar to the (federal) regulations involved in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) because of the requirement that cause exist for discharging the employee. Even if the Florida regulations here involved are construed as were the municipal rules in *Bishop v. Wood*, ". . . granting no right to continued employment but merely conditioning the employee's removal on compliance with certain specified procedures. . . ." there is a federally-cognizable claim in this case under the privileges and immunities clause of the Fourteenth Amendment because Florida personnel rules [constituting Federal Standards for Merit Systems of Personnel Administration required by federal statutory and regulatory law] were not observed. The departures from such standards through violation of Florida's personnel rules implicated interests in both liberty and property which are protected under the Fourteenth Amend-

ment, so that an action against Florida officers and employees under 42 U.S.C. § 1983, at least, should be held to lie.

While there is a qualified immunity available to officers of the executive branch of government, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974), "(i)t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity . . . ," id. Respondents are all highly experienced administrators with many years of service. Whether they could have entertained a good faith belief that petitioner's case was properly handled, or whether a basis for such belief existed, are factual matters. It is elementary under the Federal Rules of Civil Procedure that questions of fact are not to be resolved on a Rule 12(b)(6) motion to dismiss unless an evidentiary hearing is held (which was not done in this case) and the motion treated as one for summary judgment under Fed.R.Civ.P. Rule 56(c). Here Rule 56(c) would be inapplicable because the good faith issue is material and in dispute. The amended complaint did not fail to allege the respondents' actions were more than merely gross negligence. ¶ XV, Record at p. 77.

The due process claims made in this complaint are of both a substantive and procedural nature. Count 8, Record at page 78, addresses itself to the lack of ascertainable standards employed in judging petitioner's competence. This is material because one of the bases given for his termination was incompetence. Exhibit X, page two (sic), Record at p. 88. Procedurally there are complaints that the appointing authority [Exhibit

I, Record at p. 82] did not sign the termination notice [Exhibit VIII, Record at p. 86], Count 1, R. 77; that a proper delegation of authority to a subordinate was lacking to effect the termination, Count 2, R. 77; that petitioner's removal from the payroll was recommended and approved after-the-fact, Count 3, R. 77-78; that the 'evaluations' done of petitioner [Exhibits III, V at R. 83, 84] were not initialed or signed by the supervisor who made them as the proper evaluation form [Exhibit XVI, R. 92] would have required; that the right to a discussion of such evaluations and the right to object to them was not furnished the petitioner [Count 6, R. 78]; that a recommendation against petitioner's reemployment was made without notice or hearing [Count 11, R. 78]; that entries criticizing petitioner's work were made in his file without notice or hearing [Counts 14, 16, R. 79]; that petitioner was never accorded the required familiarization with departmental rules, procedures and personnel regulations [Count 28, R. 80], and so forth. *Even if all the due process claims are disregarded, there are still important First Amendment claims remaining which are supported by the presence or alleged absence of material documents.* These included effective denial of all grievance procedures [Count 12, R. 78], a claim that petitioner's discharge was a reprisal for a justified protest of working conditions [Count 18, R. 79], a claim that the termination was motivated by his expressed desire to allege that state personnel rules were being violated [Count 20, R. 79], and the denial of an exit interview [Count 25, R. 80]. If it could be proved that petitioner's termination was motivated by his justifiable protest over working conditions [Exhibit IV, R. 84] or a desire to file a lawful grievance alleging that state personnel rules were not being observed

488, 495-496, 81 S.Ct. 1680, 1683-1684, 6 L.Ed.2d 982; *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 281, 7 L.Ed.2d 285; *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; *Elfbrandt v. Russell*, 384 U.S. 11, 17, 86 S.Ct. 1238, 1241, 16 L.Ed.2d 321; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629; *Whitehill v. Elkins*, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228; *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508; *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811. WE HAVE APPLIED THE PRINCIPLE REGARDLESS OF THE PUBLIC EMPLOYEE'S CONTRACTUAL OR OTHER CLAIM TO A JOB. Compare *Pickering v. Board of Education, supra*, with *Shelton v. Tucker, supra*." (emphasis added)

Thus the question of whether petitioner enjoyed the benefit of a de facto tenure, a contract, or served at the will of respondents' employer is irrelevant here for purposes of the First Amendment claims though it may be material to the due process contentions. Contrary to the teaching of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957), it does not appear to a certainty that petitioner could prove no set of facts entitling him to relief on his First Amendment claims. At least at the stage of proceedings to which this case had advanced, the courts below had no basis in federal law for terminating petitioner's complaint and appeal.

[Exhibits VI, VII at R. 85], then what the courts below have done with this case would contravene a long line of decisions by this Court which are set out in *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972):

> "For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally-protected interests — especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." (citation omitted) Such interference with constitutional rights is impermissible. [¶] We have applied this general principle to denials of tax exemptions, unemployment benefits, and welfare payments. (citations omitted) But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell*, 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754; *Wieman v. Updegraff*, 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216; *Shelton v. Tucker*, 364 U.S. 479, 485-486, 81 S.Ct. 247, 250-251, 5 L.Ed.2d 231; *Torcaso v. Watkins*, 367 U.S.

D. The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, And Has So Far Sanctioned A Departure By The District Court, As To Call For An Exercise Of This Court's Supervision.

In order for this case to have been handled by a different judge than the one who dismissed the related case, *Weinberger v. Fla. Dept. of Commerce, ante,* the district judges had to depart from observance of their local rules. This is important because the judge who dismissed the related case pointed to the possibility of this type of action. The panel which summarily affirmed without decision a dismissal below without opinion did not observe the requirement of Local Rule 21 of the Fifth Circuit Court of Appeals that no error of law below appear *and* that the case lack precedential value. Where no opinion was written below, how can it reasonably be said that error of law below was lacking? This case has important precedential value because of the aspect presented by the required Federal Standards for Merit Systems of Personnel Administration, a question this Court and the Fifth Circuit do not appear to have ruled on previously.

Under the revised statutory standard for recusal of judges, 28 U.S.C. § 455(a) as amended, Pub.L. 93-512, Dec. 5, 1974 [Appendix D], petitioner contends that the involvement of Circuit Judge Peter T. Fay in this summary affirmance can reasonably be questioned. Shortly after becoming a Circuit Judge, he was publicly reported as warning civil litigants in the division and district of dismissal in this case that they would suffer if more federal judges were not soon appointed. This

remark was made after his elevation to the appellate bench. Miami HERALD, Jan. 14, 1977, p. 15-C [Appendix A, p. 5A]. Thus he assumed a position in which he could take part in upholding the speedy, unexplained dismissal of this case by an erstwhile, overburdened colleague, and the urge his new colleagues to join him in doing so.

While this case is not a criminal proceeding, and its direct financial effect is more limited than many federal civil cases, the importance attached to individual civil liberties in the American system makes it a grossly inappropriate case for dismissal on motion without explanation, and summary affirmance. The effect of what was done by the courts below in this case is to place an imprimatur of the federal judiciary on government by men rather than by laws. This is unthinkable. If petitioner's pleadings were so grossly short of the requirements of the Federal Rules of Civil Procedure as to fail in stating a claim or identifying the basis for federal jurisdiction, then both courts below (of whose bars petitioner is a member) have failed to protect others the petitioner may represent by pointing out in a decision, however brief, where petitioner's complaint in his own behalf failed. This case points out the failings of a mechanistic approach to screening cases in the Fifth Circuit Court of Appeals, in which more than one-quarter of the entire caseload (the largest of any federal appellate circuit) is disposed of by summary affirmance without decision. In a footnote (#4) to *Perry v. Sindermann*, 404 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972), this Court commented on the brevity of the trial court's findings there:

> "The findings and conclusions of the District Court — only several lines long — are not officially reported."

Here there were no findings and conclusions by the district court which the Court of Appeals could examine for error of law. The Fifth Circuit correctly reversed the trial court in the *Sindermann* proceedings so that there is no valid reason why this case did not merit review to see if it too was properly reversible. One of the judges on the affirming panel, an eloquent jurist, once wrote:

> ". . . litigants and counsel must not be required to be clairvoyant. They cannot read over the judge's shoulder or penetrate his memory. Nor can we. From Shakespeare's *Hamlet* to Albee's *Tiny Alice*, soliloquies and asides have been shared with the audience." *Soley v. Star Herald Co.*, 390 F.2d 364, 369-370 (CA 5, 1968).

For him to have taken part in a summary affirmance of a dismissal on motion, both without decision, when the chief judge of his court had repeatedly inveighed against the dangers of dismissals on bare pleadings shows that conditions in the Fifth Circuit Court of Appeals have broken down to a point where the intervention of this Court is warranted.

CONCLUSION

For due process purposes, this case involves *documented* interests in property (an offered period of trial employment, or a *de facto* trial tenure) and liber-

ty (unsupported public record statements of incompetence or incapacity). Even if all of the due process claims in this complaint failed, First Amendment claims remained which were supported by documentation accompanying the Amended Complaint. See Exhibits IV, VI and VII at Record pp. 84, 85; Counts 18, 20 and 25 at Record pp. 79, 80; Paragraphs VI, VIII and XIV at Record pp. 74-76. There was no showing that petitioner could prove no set of facts which would entitle him to relief on these claims, in accordance with *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). A long line of decisions by this Court cited in *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) teaches that government may not deny a benefit on account of a person's exercise of First Amendment privileges. *Perry v. Sindermann* shows that a government employee's status as to tenure is irrelevant when such denial occurs in respect to public employment, and that for due process purposes a *de facto* tenure creates a protected property interest.

For the trial judge who dismissed this case without opinion to have received it after separation from a related case, *ante*, local district court rules had to be disregarded. The judge in that case pointed to this type of action. For the Court of Appeals to have affirmed without opinion, its Local Rule 21 [Appendix B] had to be bent or broken in two ways: (1) to hold that no error of law appeared, when no opinion below had been written so that any such error would not have been visible, and (2) by ignoring the precedential value of this case presented by the "federal question" aspect of it [required Federal Standards for Merit Systems of Personnel Administration]. This case and a related

one, *ante*, were classed as civil rights actions (even though this suit presented a federal question as well). As such they are non-preference cases in the Fifth Circuit's operations. But for assignment to the summary calendar, they would have languished. The words of Russell Troutman, then president-elect of The Florida Bar, at the investiture of Circuit Judge Peter T. Fay (and District Judge Sidney Aronovitz) are worth noting here:

> "Easy access to these chambers and a patient hearing of the causes with a proper disposition of the issues should be the overriding goals of the judiciary. A clean docket accomplished by short shrift justice is the antithesis of a free society." [Florida Bar News, Nov. 1976, Vol. 3, No. 11 at p. 3]

Considering the past importance attached to individual civil liberties by a national judiciary in a federalist governmental system premised on separation of powers and checks and balances, and the quality of this decision and the one rendered in a companion case [*Weinberger v. United States, post*] by the trial judge who dismissed this action, ample reason exists for this Court to intervene in an exercise of its inherent supervisory powers over inferior federal courts. This is particularly so in view of the two refusals of a participating circuit judge to recuse himself from involvement in this affirmance without opinion of a dismissal without decision, when he had been a district judge in the same trial court only shortly before and had warned civil litigants after assuming the appellate bench that they would suffer if more federal judges were not soon appointed. A serious question of

a lack of fundamental fairness in the treatment of this case by the courts below exists, especially when the possibility of this type of action had been indicated by another trial judge in dismissing a companion action, *ante*. [See Appendix A at p. 2A]

The Fifth Circuit's screening system breaks down when, under its Local Rules 18 (summary calendar) and 21 (decisions without opinion), a case prosecuted by an attorney is affirmed without opinion after having been dismissed without a decision. Fifth Circuit Local Rule 21 should be made inapplicable to cases where there there was no opinion below and the appealing party is an attorney or is represented by an attorney. The role of federal judges is not that of merely being umpires, but is to expound the rule of law. Law is based on reason; where a civil rights case is dismissed without opinion and similarly affirmed, reason — and consequently law — is not apparent in what has been done. The result becomes government by men rather than by laws.

The inferences which can fairly be drawn from the statistical analyses of the performance of the U.S. District Court for the Southern District of Florida and the U.S. Fifth Circuit Court of Appeals found in the Annual Report of the Administrative Office for the United States Courts suggests strongly that docket control by those courts has been at the expense of civil litigants. It is astounding that more than twenty five percent of all Fifth Circuit cases requiring judicial action are disposed of by summary affirmance without opinion. This case is a glaring example of what such dispositions can include. It may be that federal judges are becoming increasingly unsympathetic to and im-

patient with civil rights cases at a time of explosive growth in caseloads. Until this Court or the Congress sees fit to alter applicable law, however, existing standards for analyzing a civil complaint under federal procedural rules and precedents from earlier civil rights actions should be maintained to promote a consistency in decisions, to build faith among litigants and prospective litigants in the federal courts, and above all to make an appeal as of right a more meaningful procedure than it has been thus far in this case.

David P. Weinberger

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

DAVID P. WEINBERGER, ESQ., *pro se*,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted by:
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

DAVID P. WEINBERGER, ESQ., *pro se*,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays for the issuance of a writ of certiorari during the pendency of an appeal to the United States Fifth Circuit Court of Appeals to review the decision of the Miami Division of the United States District Court for the Southern District of Florida entered on September 30, 1976 in the case styled *David P. Weinberger, Esq., pro se v. United States of America*, USDC SD Fla. #76-1303-Civ-CA, USCCA5 #76-4365.

OPINION BELOW

The district court dismissed this suit on the authority of one case, citation of which was written in by hand.

Appendix E, p. 35A. In denying petitioner's motion for a rehearing, the mutually exclusive grounds of lack of subject matter jurisdiction and failure to state a claim (i.e., no duty on the part of respondent) were given as the basis of dismissal. Appendix E, p. 36A. The dismissal order is [apparently] unpublished. A timely appeal was taken to the United States Fifth Circuit Court of Appeals. At the time of the writing of this petition, that court had placed this case on its summary calendar for disposition under its Local Rule 18. Appendix E, p. 37A; Appendix F, pp. 38A-39A.

JURISDICTION

The jurisdiction of this Court is sought to be invoked pursuant to Title 28, United States Code, Section 1254(1) on grounds set forth in Rule 20 of this Court, and in accordance with its Rules 19, 21, 22 and 23.

QUESTIONS PRESENTED

I.

WHETHER THE UNITED STATES ENJOYS ANY DISCRETION UNDER 42 U.S.C. § 503(b)(2) TO FUND A STATE AGENCY GRANTEE IN THE FACE OF THAT AGENCY'S LONG HISTORY OF FAILURES TO COMPLY WITH THE REQUIREMENT OF 42 U.S.C. § 503(a)(1) FOR A MERIT SYSTEM OF PERSONNEL ADMINISTRATION, SO AS TO BE IMMUNE FROM SUIT UNDER 28 U.S.C. § 2680(a).

II.

WHETHER THE UNITED STATES OWED A DUTY WHICH CAN BE ENFORCED BY A FORMER

EMPLOYEE OF A STATE AGENCY GRANTEE WHO CLAIMS HIS TERMINATION WAS IN GROSS VIOLATION OF REQUIRED FEDERAL STANDARDS FOR MERIT SYSTEMS OF PERSONNEL ADMINISTRATION AND THAT SUCH DISCHARGE OCCURRED BECAUSE OF (1) CONTINUED GOVERNMENT FUNDING DESPITE A LONG HISTORY OF PERSONNEL ADMINISTRATION COMPLIANCE FAILURES BY THE GRANTEE AGENCY PRIOR TO HIS HIRE and/or (2) LENGTHY DELAY BY THE GOVERNMENT IN DETECTING AND REPORTING ON SUCH PREVIOUS FAILURES.

III.

[See issue common to these cases as set out in *Weinberger v. Florida Department of Commerce, ante* at pp. 5-7. Petitioner perceives the question of any Government duty owed to him, Issue II, *supra*, as a preliminary matter which is close to, but not exactly the same as, whether the Government's actions produced a result which gives him a cause of action cognizable in either state or federal law.)

FEDERAL STATUTES, REGULATIONS AND RULES INVOLVED:

Appendix F:

Title 28, United States Code, Sections 1346(b), 2680(a);

United States Supreme Court Rule 20;

Local Rule 18, United States Fifth Circuit Court of Appeals.

result of the failure of federal administrators to insist upon merit system methods of personnel administration. There unemployment compensation claimants brought suit over unreasonably lengthy delay in the payments of benefits. It was shown that the administrative appeal process was a substantial factor in the delays, and that prior to a 1974 change in Connecticut law that State's unemployment compensation appeals referees were political rather than merit system appointees even though the latter method of selection had been required since at least 1971. The claimants in *Fusari v. Steinberg, supra*, did not raise the question of the Government's duty to insist upon such standards because, among other things, they were litigating with the State and not the United States. This Court sent the case back down in view of the change in Connecticut law during the pendency of that appeal. Thus, though the question of the Government's duty under 42 U.S.C § 503 might also have been raised by the claimants in *Fusari v. Steinberg, supra*, it was not and this Court thus did not have the opportunity to rule on the question. Moreover, the claimants in *Fusari v. Steinberg* were the principal intended beneficiaries of such statutory requirement. Here, the question of the Government's duty is raised by one of the employees supposedly entitled to the benefits of Federal Standards for Merit Systems of Personnel Administration, on the theory that he and workers like him were intended though not principal beneficiaries of the requirement. The question is not an idle or speculative one. In unemployment compensation programs alone of the type involved in this case and in *Fusari v. Steinberg*, at least FIFTY jurisdictions receive federal assistance on the basis of their certifications to the Government that

Appendix B:

Title 42, United States Code, Sections 503, 4701, 4702, 4728(a)(2)(B);

Title 20, Code of Federal Regulations, Part 601, Subpart A;

Title 29, Code of Federal Regulations, Part 31;

Title 45, Code of Federal Regulations, Part 70.

[Petitioner has requested certification of the record to this Court. Federally-approved Florida Personnel Rules which flesh out the statutory and regulatory requirement of Federal Standards for Merit Systems of Personnel Administration appear in the certified records in *Weinberger v. Florida Dept. of Commerce*, *ante*, and *Weinberger v. Trombetta*, *ante*, at pp. 101-111 and 93-103, respectively.]

STATEMENT OF THE CASE

The jurisdictional bases of this action are Sections 1346(b) and 2680(a) of Title 28, United States Code. Reasons within the intent of Rule 20 of this Court as to why certiorari should be granted in this case even though the Court of Appeals may not yet have ruled on it follow the reasons why, under Rule 19 of this Court, the petition should be granted, *infra*.

No discovery was had in the trial court because of the short time (2 weeks) which elapsed between amendment of the complaint once as of right

[Fed.R.Civ.P. Rule 15(a)] and the time of dismissal. It is therefore not clear at this juncture why U.S. Department of Labor Audit Report #04-75-044-L published on Feb. 28, 1975 covered a period as long as four years (mid-1969 through mid-1973), why it took 20 months following the close of the audit period to publish the findings, and what may have triggered the audit. The conclusion of this report is a material element in the basis of this suit:

> "Based on personnel violations contained in this report, the management of the agency [Florida Department of Commerce] is inadequate to administer a merit system for agency personnel. As a result of certain practices, both state and federal laws were violated." (Statement of Opinion at p. 7, U.S. DoL Auditor's Report #04-75-044-L, Feb. 28, 1975, cited in complaint as amended, Paragraph 9, Record at p. 3; Paragraph 6.5, Record at p. 20.)

In all other material respects, the facts of this case are as stated in *Weinberger v. Florida Department of Commerce*, *ante* at pp. 9-13.

REASONS WITHIN RULE 19 OF THIS COURT FOR ALLOWANCE OF THE WRIT.

A. The Trial Court's Summary Dismissal Has Decided An Important Question Of Federal Statutory Law Which Has Not Been, But Should Be, Decided By This Court.

Fusari v. Steinberg, 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1974), brought to this Court's attention the

Federal Standards for Merit Systems of Personnel Administration are in effect. Those standards apply to a variety of other federally assisted state programs, under various titles of the Social Security Act. Petitioner stakes his claim to being able to raise the question of the Government's duty to him and persons similarly situated in no small part on a Congressional declaration that merit system standards of personnel administration serve a national interest. 42 U.S.C. § 4701.

The Government has contended the decision by its personnel to fund Florida's Department of Commerce notwithstanding a lengthy history of failures to comply with Federal Standards for Merit Systems of Personnel Administration is a "political decision" requiring judgment and discretion, so that a district court lacks the jurisdiction to review it. Brief of respondent in support of its motion to dismiss, at Record p. 28. While it may be a "political decision" to decide whether to seek recovery of funds wrongfully spent by a grantee agency, the mandate of 42 U.S.C. § 503(a)(1), (b)(2) that Government funding stop in the absence of the required administrative standards cannot be more plain on its face. In a governmental system where consent of the governed is the basis of the sovereign's power, and in a situation where the elected representatives have twice used the word 'shall' in respect to the standards required to be employed in the distribution of federal funds to the states, 42 U.S.C. § 503 (a)(1), (b)(2), Appendix B, it still appears that a decision by this Court is required in order to enforce the intent of Congress. That decision has not been, but should be, made by this Court in the most unequivocal of opinions so that welfare claimants' rights are protected, state employees are not subject to

arbitrary actions, and federal administrators know exactly what is expected of them.

B. The Court Of Appeals Has Before It A Decision In Conflict With Another Court Of Appeals On The Same Matter.

The district court dismissed this suit for lack of jurisdiction over the subject matter *and* failure to state a claim. The latter is based on the trial court's assertion that the United States bore no duty to petitioner under which he could legally enforce his claim. The former implies that, because a discretionary act is involved, jurisdiction over the subject matter is lacking in view of the wording of 28 U.S.C. § 2680(a):

> The provisions of this chapter and section 1346(b) of this title shall not apply to — (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. [Appendix F, p. 37A.]

In *Ingham v. Eastern Air Lines*, 373 F.2d 227, 238 (CA2, 1967), it was said that

> "[d]iscretion was exercised when it was decided to operate the (air traffic control) tower, but tower personnel had no discretion to operate it negligently."

Another judge in the district court which dismissed this case has cited *Ingham v. Eastern Air Lines, supra*, in a case later affirmed by the Fifth Circuit Court of Appeals. *Kiesel v. Fla. Dept. of Natural Resources*, USDC SD Fla. #71-1393-Civ-JE (Caleb Layton, III, U.S. District Judge), *affirmed* 479 F.2d 1261 (CA5, 1973). Whatever discretion may have been possessed by federal officials and employees in this case could not include negligence or being dilatory in detecting and reporting on compliance failures by federally-funded agencies, if the entire Congressional intent was not to be negated or thwarted. While the Secretary of Labor may have the discretion to seek recovery of funds improperly spent by a grantee state agency [an action he apparently chose in respect to the Florida Department of Commerce], such attempt to recover funds is not compliance with the mandate of 42 U.S.C. § 503 (a)(1), (b)(2). Neither the Secretary of Labor nor any other officer or employee of the Government has the discretion to overlook a pattern of grantee state agency violations covering a four year span, and where the Government's recovery efforts do not assure an end to those infractions. It should be noted that in *Ingham v. Eastern Air Lines, supra*, no clear statutory mandate appears to be involved as here, yet the Second Circuit Court of Appeals held that once the decision to erect an air traffic control tower had been made (an exercise of discretion), it could not be maintained or operated in negligent fashion. In *Ingham*, an action could not have been founded on the decision to construct or not to construct a tower; here, but for the remarkably explicit wording of the statutory command [42 U.S.C. § 503(a)(1), (b)(2), Appendix B] this action might not have been maintainable. In sum, once respondent's personnel undertook to investigate compliance with

applicable standards by the Florida Department of Commerce (which they were implicitly obliged to do in following Congressional intent), they had no discretion to be negligent or dilatory in such examinations and reports. In this regard respondent would be liable for the acts of its personnel as would a private party, 28 U.S.C. § 1346(b), Appendix F, pp. 38A-39A.

C. The Court Of Appeals Has Before It An Opinion Of The District Court Which Decided A Federal Question In A Way That Conflicts With Applicable Decisions Of This Court.

Respondent has contended that liability cannot be predicated upon acts of a governmental nature. Brief in support of motion to dismiss, pp. 5, 7, Record at pp. 26, 28. At least two cases decided by this court subsequent to *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), have thrown the continuing vitality of that decision into question. In *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957), the Government also relied on *Dalehite, supra*. This Court rejected any implication of *Dalehite* that the distinction between "proprietary" and "uniquely governmental" activities, imported from law of municipal corporations, was controlling in Federal Tort Claims Act cases, citing *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). One federal district judge has written that Mr. Justice Frankfurter, writing for this Court in *Indian Towing, supra*, appeared to question the correctness of the *Dalehite* decision. *In re Silver Bridge Disaster Litigation*, 381 F.Supp. 931, 968 (DC SD W.Va. 1974). It is significant to note that respondent's memorandum

of law in support of its motion to dismiss made no mention whatever of either *Rayonier* or *Indian Towing*, but relied heavily on *Dalehite*.

The effect of the decision now before the Court of Appeals for review is to ignore decisions of this Court which have held that

> "the Government's liability is no longer restricted to circumstances in which governmental bodies have traditionally been responsible for misconduct of their employees. The (Federal Tort Claims) Act extends to novel and unprecedented forms of liability as well. Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48; Rayonier, Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354." *United States v. Muniz*, 374 U.S. 150, 159, 83 S.Ct. 1850, 1856, 10 L.Ed.2d 805 (1963).

It also ignores cases of the genre which includes *Laird v. Nelms*, 408 U.S. 797, 799, 92 S.Ct. 1899, 1901, 32 L.Ed.2d 499 (1972):

> "Regardless of state law characterization, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of "misfeasance or nonfeasance," (citation omitted) on the part of the Government."

Here the claim is one of non-feasance by the Secretary of Labor (failure to comply with statutory mandate, 42 U.S.C. § 503, to cut off funding to the Florida Department

of Commerce for a 4 year history of violations of Federal Standards for Merit Systems of Personnel Administration long before petitioner was hired by that grantee agency) and misfeasance by other Government personnel (negligent and dilatory investigation of and reporting on those violations). In denying a motion by petitioner for rehearing, the trial judge who dismissed this case gave as reasons, *inter alia*, lack of subject matter jurisdiction *and* failure to state a (federal) claim. Appendix E at p. 36A. Over thirty years ago, this Court held in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), that these are mutually exclusive grounds for dismissal on motion under the Federal Rules of Civil Procedure. Lack of subject matter jurisdiction precludes reaching the question of whether a claim has been stated upon which relief can be granted by a federal district court, and the latter question is to be decided only after the threshold question of jurisdiction is affirmatively resolved. This burdens a Court of Appeals unnecessarily by forcing an appellant to write a more lengthy brief than would otherwise be required if a decision had been rendered in accordance with case law of this Court on the Federal Rules of Civil Procedure. Present case loads being what they are in the federal Courts of Appeal, a longer brief is bound to make persuading any such court to reverse a decision below even more of an uphill battle than it already is.

D. The Court Of Appeals Has Before It, And Can Reasonably Be Expected To Affirm, A Decision By The District Court Which Represents A Departure So Far From The Accepted And Usual Course Of Judicial

Proceedings As To Call For An Exercise Of This Court's Supervision.

The trial judge who dismissed this case had earlier dismissed *Weinberger v. Trombetta et al., ante* at pp. 32-64, without any explanation in that dismissal or the order denying a motion for relief therefrom. The Order of Dismissal in this case, Appendix E at p. 35A, cited *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) as authority, by a handwritten insertion almost as an afterthought. The trouble with this is the doubt of *Dalehite's* continuing validity in view of two subsequent cases in this Court, *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955) and *Rayonier, Inc. v. United States,* 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957). *Dalehite* is also *totally* inapposite to this case for another reason: "Regardless of state law, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of "misfeasance or nonfeasance," 346 U.S. at 45, 73 S.Ct. at 972, on the part of the Government." *Laird v. Nelms,* 406 U.S. 797, 799, 92 S.Ct. 1899, 1901, 32 L.Ed.2d 499 (1972). *Dalehite IS A STRICT LIABILITY CASE; HOW CAN IT BE AUTHORITY FOR THE DISMISSAL OF A FEDERAL TORT CLAIMS ACT SUIT WHICH IS NOT PREMISED ON ABSOLUTE LIABILITY, BUT IS FOUNDED ON ALLEGED MISFEASANCE AND NONFEASANCE?* It is worth noting that the Government's memorandum of law in support of its motion to dismiss never mentioned *Indian Towing* or *Rayonier.* In that brief respondent mentioned 42 U.S.C. § 503 only perfunctorily, giving no reason why the explicit mandate of that statute would not have required a cutoff in

Government funding of Florida's Department of Commerce for its 4 years of noncompliance or why it took so long (20 months) to report on those violations.

The dismissal order in this case did not mention that the district court had found no duty to petitioner on the part of the Government. Appendix E, p. 35A. Petitioner moved for a rehearing, and only in the denial of that motion, Appendix E at p. 36A, did the trial judge indicate that the failure to state a claim he found resulted from a lack of Government duty to the petitioner. There was no analysis of why such duty was lacking, and the dismissal order did not mention whether such lack of duty was found under 42 U.S.C. § 503 or 42 U.S.C. 4701 *et seq.,* or both. [The other basis on which failure to state a claim might have been found was, of course, that the alleged injury was not the proximate result of the actions of Government employees. This is a matter raised by the Government in its motion to dismiss, and replied to by petitioner with some black letter, hornbook law of Florida on proximate cause.] 42 U.S.C. § 503(a)(1), (b)(2) is the statute which *twice* uses the word *SHALL* in respect to Federal Standards for Merit Systems of Personnel Administration being a condition of federal fiscal aid to grantee state agencies like the Florida Department of Commerce. Small wonder that the Government barely mentioned 42 U.S.C. § 503; that statute shoots down its argument premised only on the Intergovernmental Personnel Act of 1970, 42 U.S.C. § 4701 *et seq.*

Petitioner is an attorney. He knows, or certainly should know, that he must connect himself to the purpose of a statute before he can claim relief for injury resulting from its violation. He has done so in his prin-

cipal brief on appeal to the Court of Appeals, by delving into the legislative history underlying 42 U.S.C. § 503, the statute on which he relies. But petitioner also knows that the district courts in the federal judicial system conduct some analysis of statutes and their origins in order to determine what the extent of duties they create at law is. See, e.g., *Social Security Administration Baltimore F.C.U. v. United States*, 138 F. Supp. 639, 645-7 (DC Md. 1956); *In re Silver Bridge Disaster Litigation*, 381 F. Supp. 931, 965-6 (DC W.Va. 1974). The claim in this case is one where the ruling on duty under the statute principally involved, 42 U.S.C. § 503, affects large classes of people (welfare claimants in a variety of federally-assisted programs, and numerous employees of grantee state agencies) in important ways. Petitioner feels that, under these circumstances, it is not expecting too much for a trial court to briefly explain why it found subject matter jurisdiction lacking, and no duty on respondent's part toward him and persons similarly situated, particularly when application of the Court of Appeals' rule on summary affirmances without opinion rests (presumably) on there being no error of law apparent below *and* that the case lacked precedential value. Fifth Circuit Court of Appeals Local Rule 21, Appendix B, p. 10A. It was known before dismissal that an appeal was quite likely in this case, yet that did not assist in obtaining a meaningful opinion from the trial court. Petitioner believes that the quality of jurisprudence exhibited in this case, which he fervently hopes is atypical of the federal judiciary, taken in the light of what was done in the related cases at both the trial and appellate level, warrants the supervisory intervention of this Court unless it is willing to permit

the role of the lower federal courts to deteriorate to mere umpiring which allows government not by laws but by men.

REASONS WITHIN RULE 20 OF THIS COURT FOR ALLOWANCE OF THE WRIT BEFORE DECISION BY THE COURT OF APPEALS

(On June 27, 1977, petitioner received notice that this case was being placed on the Fifth Circuit Court of Appeals' summary calendar. Appendix E, p. 37A. Anticipating this as a prelude to another Rule 21 summary affirmance without decision, he contacted the office of that court's clerk in an attempt to ascertain whether this case would also be affirmed. He was unable, prior to sending the text of this petition to the printer by July 5, 1977, to determine whether an affirmance would follow in approximately one week as occurred in the related cases, *ante*. In the event of an affirmance by the Court of Appeals prior to the consideration of this petition by this Court, the following Rule 20 discussion is inapplicable. Petitioner will advise this Court by a supplement to this petition of any further action by the Court of Appeals.)

There is adequate legal reason for this Court to review the instant case in advance of any ruling on it by the Court of Appeals, even though seizure of steel mills by the President acting under emergency powers, *Youngstown Co. v. Sawyer*, 343 U.S. 579, or a bituminous coal strike of national dimensions, *United States v. United Mine Workers*, 330 U.S. 258, or war-

time trial of spies, *Ex Parte Quirin*, 317 U.S. 1, or the constitutionality of a tax statute, *Rickert Rice Mills v. Fontenot*, 287 U.S. 110, *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, or the validity of social legislation cast as tax law, *Carter v. Carter Coal Co.*, 298 U.S. 238, or the adequacy of payment in legal tender, *United States v. Bankers Trust Co.*, 294 U.S. 240, is not involved. The federal standards required in this case (and the related cases, *ante*) under 42 U.S.C. § 503 have been declared of national interest by Congress. 42 U.S.C. § 4701. Considering the importance of enforcement of such standards, the lack of obviousness here makes this Court's review more rather than less important. The laxity of federal administrators will not be able to continue if this Court examines the questions herein raised. In *Ex Parte Quirin*, 317 U.S. 1 (1942), it was noted that the (federal) courts were open and functioning normally in wartime. Here the contention is that in peacetime while they are open there is a serious question of whether inferior federal courts, both at the trial and appellate level, are functioning as intended.

This Court granted certiorari in *Rickert Rice Mills v. Fontenot*, 297 U.S. 110, in part on the representation of petitioners there that they would not be able to recover an allegedly unconstitutional tax because grounds for recovery required a showing of fact not susceptible of proof. An analagous reason exists in this case (and the related ones, *ante*) for review by this Court which is alluded to in the summation of this trilogy of cases. While this case may not call for the intervention of this Court in a matter of days, that should not mean that intervention is entirely unwarranted. At the peak of a great increase in unemployment compensation claims in all states of this nation in 1975, one can only speculate how much suffering was visited upon those claimants resulting from the lack of federal enforcement of Merit System Standards of Personnel Administration. That should not be permitted to occur, in unemployment compensation and numerous other welfare programs as well. This case really presents the ultimate issue in a government based on a balance of powers: when Congress has instructed the Executive Branch of government how it desires programs to be administered, and a private citizen is injured by reason of failure of the Executive Branch to comply, can friction between branches of government be avoided and enforcement enhanced by permitting the citizen alleging injury to recover by resort to the judicial process? The importance of this question should clearly warrant the intervention of this Court whether or not the Court of Appeals has first ruled upon this controversy.

CONCLUSION

This is not a liability-without-fault case. Therefore the trial court's citation of *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1426 (1953) as authority for this dismissal is wholly inappropriate. Cases subsequent to *Dalehite* have eliminated the distinction between "proprietary" and "uniquely governmental" activities. *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957). Thus, liability for misfeasance or nonfeasance can attach under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, even though it is embedded in an overall activity which a private per-

son would have no occasion to perform. Placing this case on the summary calendar of the Court of Appeals under its Local Rule 18 (Appendix E, p. 39A) is also inappropriate because of the precedential value of this case under the Federal Tort Claims Act and in regard to Federal Standards for Merit Systems of Personnel Administration *required and found to be in the national interest* by federal statutes. 42 U.S.C. §§ 503, 4701. The trial court erred in dismissing for *both* lack of jurisdiction of subject matter *and* failure to state a federal claim. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). There was no visible analysis of duties under the statutes here in question, 42 U.S.C. §§ 503, 4701 *et seq*. Petitioner has connected himself with the purpose of the statutes requiring Federal Standards for Merit Systems of Personnel Administration, in his principal brief on appeal. It is not necessary that he be a primary intended beneficiary of a statute in order to have standing to raise questions concerning its violation. *Constructores Civiles de Centroamerica, S.A. (CONICA) v. Hannah*, 459 F.2d 1183 (C.A.D.C., 1972). A summary affirmance of this case under the Fifth Circuit's Local Rule 21, without decision, would be inappropriate because (1) this case has significant precedential value, and (2) there is obvious error of law below.

At one juncture in all of these proceedings, petitioner moved to have all three cases considered by the same judicial panel. This seemed to be an eminently reasonable motion, yet it was denied by order of Circuit Judge Peter T. Fay. Appendix G, p. 41A. Nevertheless, the two related cases, *ante*, were affirmed by the same panel [upon orders entered by Judge Fay]. Petitioner quite expects this case to be summarily affirmed without decision, probably by the same panel. On the basis of Judge Fay's statement about how civil litigants in the Southern District of Florida would suffer if more judges were not soon appointed, made after he assumed the appellate bench [Appendix A, p. 8A], petitioner registers his objection to Judge Fay's involvement in this case for the reasons set forth in the related actions, *ante*. Judge Fay's refusal to recuse himself applied to this case as well. Appendix A, pp. 8A, 9A.

Considering the fact that the trial judge who dismissed this case also dismissed petitioner's civil rights case, *Weinberger v. Trombetta et al., ante*, without opinion, there is a serious question of whether he gave this case or that one minimally acceptable and meaningful consideration. Petitioner respectfully submits that the quality of trial and appellate court jurisprudence shown in this case as well as the related ones warrants review by this Court in the exercise of its supervisory powers over inferior federal courts.

David P. Weinberger

EPILOGUE TO A TRILOGY

On December 19, 1974 at the age of 47 petitioner achieved a lifetime ambition. He was then admitted to the practice of law in Florida. On the Government's Army General Classification Test (AGCT) petitioner scored a 149 in 1945. This is supposedly a close correlation to intelligence quotient, and is a level within the top 3% of persons tested. Petitioner qualified for admission to law school on the basis of the Law School Admissions Test (LSAT), never failed a course in any academic institution, and passed the Florida Bar Examination on his first try. He has never been involved with a lawsuit in the federal courts without an appeal having been taken.

Since becoming an attorney, petitioner has filed one other (unrelated) suit in the federal district court for the Southern District of Florida, Miami Division. His appeal in that case is still pending as of this writing. That suit was also dismissed on motion, for lack of standing and failure to state a federal claim. In that suit petitioner learned just after the dismissal that the trial judge's son was a member of the defense firm (though not, of course, counsel of record in the case). Petitioner made every effort there to have the dismissal vacated, to no avail. As a last resort, he very reluctantly filed an affidavit of bias against the trial judge. See 28 U.S.C. § 455(a), as amended Dec. 5, 1974, Pub.L. 93-512, 88 Stat. 1609. Now petitioner will always speculate, but never know, whether the dispositions of the cases in this petition were in any way influenced by that action.

The result is that in *eight* attempts (four amended complaints) in the Miami Division of the Southern District of Florida since April, 1975, petitioner has not once been able to achieve federal jurisdiction, or standing, or state a federal claim. The Chief Justice of this Court has very recently expressed the view that many if not most lawyers in practice today are not professionally competent. Any or all of these cases would provide an opportunity for this Court to expound on that crucial subject. Obviously petitioner has not mastered the pleading art. He need not do so to survive motions to dismiss under the intent and spirit of the Federal Rules of Civil Procedure. At least on the narrow matters of federal subject matter jurisdiction, standing and stating a federal claim, petitioner should be willing to stand in public view to be judged on the adequacy of his pleadings in these cases. There is little reason to believe petitioner could be a much more effective advocate for a client than he could be for himself, where he believes his cause is a meritorious one on its facts and law. By reviewing these cases, this Court could simultaneously examine the competence of an attorney admitted to the bars of both lower courts, and check to see how those courts are functioning in civil cases.

Farrer Herschell's well-known retort at the Bar when Sir George Jessel attempted to cut him short in argument is appropriate here:

> "Important as it was that people should get justice, *it was even more important that they should be made to feel and see that they were getting it.*" (Emphasis added). 2 J. Atlay, Victorian Chancellors 460 (1908).

Petitioner takes little solace from the realization that, if he were a common criminal or a sophisticated swindler in fancy clothes, more deference would have been accorded him by the lower federal courts. Petitioner neither sees nor feels that substantial justice was done in these cases. He has therefore borne the heavy cost burden and made the considerable effort necessary to ask for the exercise of this Court's supervisory jurisdiction. By no means is the petitioner the only person with a substantial stake in the matters here at issue.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number 76-3-Civ-JE

DAVID P. WEINBERGER,
Plaintiff

vs.

STATE OF FLORIDA, DEPARTMENT OF COMMERCE,
Defendant

ORDER OF DISMISSAL

THIS CAUSE is before the Court on Defendant's Motion to Dismiss the Amended Complaint.

The Plaintiff is seeking redress against an agency of the State of Florida for alleged discrimination in empioyment practices. In his Amended Complaint, he relies upon 28 U.S.C. §§1331 and 1343, 42 U.S.C. §2000 d, and 42 U.S.C. §4701, *et seq*. as jurisdictional bases. The Court has concluded that these sections do not confer jurisdiction over the subject matter of this cause.

Plaintiff alleges that Defendant has failed to comply with regulations promulgated pursuant to the Intergovernmental Personnel Act, 42 U.S.C. §4701, *et seq*. The goal of this Program is to improve the quality of public service "by the development of systems of personnel administration consistent with . . . merit

principles." 42 U.S.C. §4701. Federal funds may be withheld from state and local agencies found not to be in compliance with the terms of the Program, but there is no express or implied provision for a private right of action.

Plaintiff further alleges that defendant has deprived him of his civil rights. It is clear that he can maintain no action under 42 U.S.C. §1983, since an agency of a state is not a "person" within the language of the Civil Rights Act of 1871. *Allison v. California Adult Authority*, 419 F. 2d 822 (CA 9, 1969). Similarly, Plaintiff cannot assert a claim in Federal Court against a state agency pursuant to Title VI (42 U.S.C. § 2000 d). The Eleventh Amendment bar applies to Title VI actions, *Gilliam v. City of Omaha*, 388 F. Supp. 842 (D.C. Neb., 1975), and the State of Florida has not waived its right to this immunity by enacting F.S. §768.28. That section provides only that tort actions against the state may be brought in a court of "appropriate jurisdiction," and where there is no clear intent in a waiver of immunity statute to subject state agencies to actions in federal courts, such suits may not be maintained. *Williams v. Eaton*, 443 F. 2d 422(CA 10, 1971). Nor has the Defendant waived immunity in this action by entering its appearance, since the question of subject matter jurisdiction has been raised in the Motion to Dismiss and no Answer has been filed.

The Plaintiff may be able to maintain an action in tort against an agency of the State in state court, and may have a claim for deprivation of civil rights against officers of the State in Federal Court. However, he has not stated a federal claim against the Defendant in this cause.

Accordingly, it is ORDERED and ADJUDGED that Defendant's Motion to Dismiss is GRANTED, and this cause is hereby dismissed with prejudice.

DONE and ORDERED at Miami, Southern District of Florida, this 20 day of May, 1976.

/s/ JOE EATON
United States District Judge

cc: David P. Weinberger
Thomas A. Gribbin

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2981
Summary Calendar*

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

STATE OF FLORIDA, Department of Commerce,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

(MARCH 29, 1977)

BEFORE GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2981

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

STATE OF FLORIDA,
Department of Commerce,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion March 29, 1977, 5 Cir., 197__, ____ F.2d ____).

(APRIL 29, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ PETER T. FAY
United States Circuit Judge

[Filed: Apr. 29, 1977]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2981

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

STATE OF FLORIDA, Department of Commerce,
Defendant-Appellee.

No. 76-3278

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

EDWARD J. TROMBETTA, ET AL.,
Defendants-Appellees.

No. 76-4365

DAVID P. WEINBERGER, ESQ.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeals from the United States-District Court for the Southern District of Florida

ORDER:

IT IS ORDERED that the motion for recusal is hereby DENIED. The motion states no legal grounds and is insufficient as a matter of law.

/s/ PETER T. FAY
UNITED STATES CIRCUIT
JUDGE

LOCAL NEWS CAPSULES

Friday, Jan. 14, 1977 THE MIAMI HERALD

Courts Overloaded, U.S. Judges Say

A massive caseload increase has crippled the ability of the federal courts in Miami and New Orleans to handle civil matters, two federal judges told Miami lawyers Thursday.

"And conditions are going to get worse in geometric proportions unless something is done ... adding some 28 to 30 judges," said Fifth Circuit Court of Appeals Judge Peter Fay.

Fay told a Dade Bar Association luncheon that citizens, in effect, have no federal court to turn to. "The taxpayers deserve a better shake," he said.

Judge James Lawrence King predicted that in the next year "no civil cases will be tried in the Southern District of Florida." Criminal cases, he said, occupy virtually all of the court's time.

In 1976, the average caseload in Miami weas 800, compared to 300 in Washington and 400 in Chicago.

BEST COPY AVAILABLE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3278

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

EDWARD J. TROMBETTA, ET AL.,
Defendants-Appellees.

No. 76-4365

DAVID P. WEINBERGER, ESQ.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Florida

ORDER:

IT IS ORDERED that the renewed motion of pro se appellant for recusal of Judge Peter T. Fay, filed in each of the referenced causes, is denied.

/s/ PETER T. FAY
UNITED STATES CIRCUIT
JUDGE

APPENDIX B

Local Rule 21, U.S. Fifth Circuit Court of Appeals:

AFFIRMANCE WITHOUT OPINION: When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgement of the District Court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the Court also determines that an opinion would have no precedential value, the judgement or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or ENFORCED. See Local Rule 21."

See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5th Cir., 1970, 430 F.2d 966.

United States Constitution:

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

RATIFIED JANUARY 8, 1798.

1968 Constitution of Florida, Article X

SECTION 13. Suits against the state.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

[An identically-phrased section appeared in Article III, Section 22 of the 1885 Constitution and first appeared in the 1868 Constitution. See commentary, 26A Fla.Stats.Ann. 530]

United States Constitution:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Florida Statutes, Chapter 768.28

1 Florida Statutes (1975), pp. 2037-2038:

*768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitation; exclusions.—

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort

BEST COPY AVAILABLE

for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

(3) Except for a municipality, the affected agency or subdivision may, at its discretion, request the assistance of the Department of Insurance in the consideration, adjustment, and settlement of any claim under this act.

(4) Subject to the provisions of this section, any state agency or subdivision of the state shall have the right of appealing any award, compromise, settlement, or determination to the court of appropriate jurisdiction.

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $50,000, or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state arising out of the same incident or occurrence, exceeds the sum of $100,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $50,000 or $100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the legislature, but may be paid in part or in whole only by further act of the legislature.

(6) An action shall not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, presents such

claim in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing. The failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted by counterclaim pursuant to s. 768.14.

(7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality, upon the Department of Insurance, and the department or the agency concerned shall have 30 days within which to plead thereto.

(8) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.

(9) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Subject to the monetary limitations set forth in subsection (5), the state shall pay any monetary judgment which is rendered in a civil action personally against an officer, employee, or agent of the state which arises as a result of any act, event, or omission of action within the scope of his employment or function.

(10) If the state or its agency or subdivision is insured against liability for damages for any negligent or wrongful act, omission, or occurrence for which action may be brought pursuant to this section, then the limitations of this act shall not apply to actions brought to recover damages therefor to the extent such policy of insurance shall provide coverage. Agencies or political subdivisions presenting homogeneous risks may join together to purchase insurance protection or to provide other means of meeting obligations for damages as provided by this act.

(11) Laws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act.

(12) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues.

(13) No action may be brought against the state or any of its agencies or subdivisions by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of such riot, unlawful assembly, public demonstration, mob violence, or civil disobedience. Nothing in this act shall abridge traditional immunities pertaining to statements made in court.

History.—s. 1, ch. 73-313; s. 1, ch. 74-235.
*Note.—See s. 768.30 as to time of taking effect.

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1 Fla.Stats. (1975) 78

16.01 Residence, office and duties of attorney general.—The Attorney General shall reside at the seat of government, and shall keep his office in a room in the capitol; he shall perform the duties prescribed by the constitution of this state, and also perform such other duties appropriate to his office, as may from time to time be required of him by law, or by resolution of the legislature; he shall, on the written requisition of the Governor, Secretary of State, Treasurer, or Comptroller, give his official opinion and legal advice in writing on any matter touching their official duties; he shall appear in and attend to in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court and district courts of appeal of this state; he shall appear in and attend to such suits or prosecutions in any other of the courts of this state, or in any courts of any other state, or of the United States; he shall have and perform all powers and duties incident or usual to such office, and he shall make and keep in his office a record of all his official acts and proceedings, containing copies of all his official opinions, reports and correspondence, and also keep and preserve in his office all official letters and communications to him, and cause a registry and

index thereof to be made and kept, all of which official papers and records shall be subject to the inspection of the Governor of the state, and to the disposition of the Legislature by act or resolution thereof.

History.—s. 2, ch. 2, 1845; ch. 1845, 1871; RS 85; GS 87; RGS 101; CGL 125; s. 7, ch. 22858, 1945; s. 7, ch. 59-1.
cf.—s. 2, Art. II; s. 4, Art. IV, State Const.

16.05 To report on laws.—The Attorney General shall make a written report to the Governor 5 days before the first day of every session of the legislature, as to the effect and operation of the acts of the last previous session, the decisions of the courts thereon, and referring to the previous legislation on the subject, with such suggestions as in his opinion the public interest may demand, which report shall be laid before the Legislature by the Governor with his first message.

History.—s. 5, ch. 2, 1845; RS 88; GS 91; RGS 105; CGL 129.

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1 Fla.Stats. (1975) 95:

20.11 Department of Legal Affairs.—There is created a Department of Legal Affairs.

(1) The head of the Department of Legal Affairs is the Attorney General.

(2) The powers, duties, and functions of the Attorney General and the office of the Attorney General as prescribed by law, except those required by the State Constitution to be performed by the Attorney General directly, are transferred by a type three transfer to the Department of Legal Affairs.

(3) The Department of Legal Affairs shall be responsible for providing all legal services required by any department, unless otherwise provided by law. However, the Attorney General may authorize other counsel where emergency circumstances exist and shall authorize other counsel when professional conflict of interest is present. Each board, however designated, of which the Attorney General is a member may retain legal services in lieu of those provided by the Attorney General and the Department of Legal Affairs.

History.—s. 11, ch. 69-106.

1 Fla.Stats. (1975) 1305:

Ch. 284
PART II

FLORIDA CASUALTY INSURANCE RISK MANAGEMENT TRUST FUND

284.35 Administrative personnel; expenses to be paid from fund.—The Department of Insurance is hereby authorized, in accordance with current budget and personnel requirements, to employ necessary administrative and clerical personnel and actuarial consultants, as necessary to maintain, operate, and administer the fund. All salaries and expenses of administration and operation shall be paid from the fund.

History.—s. 1, ch. 72-206.

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1 Fla.Stats. (1975) 1306:

*284.38 Waiver of sovereign immunity; effect. —In the event sovereign immunity is waived in whole or in part, the insurance programs developed herein shall provide coverage only to the extent of such waiver of sovereign immunity.

History.—s. 1, ch. 72-206.
*Note.—Ch. 73-313, Laws of Florida, enacted as 768.28-768.30, relating to the waiver of sovereign immunity, to take effect January 1, 1975.

Title 42, United States Code (1970), pp. 9863:

§ 503. State laws, provisions required; stopping payments on failure to comply with law.

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel stand-

ards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

(b) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State: *Provided*, That there shall be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisdiction under such State law: *Provided further*, That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

Title 42, United States Code (1970), p. 10703:

§ 4701. Congressional findings and declaration of policy.

The Congress hereby finds and declares—

That effective State and local governmental institutions are essential in the maintenance and development of the Federal system in an increasingly complex and interdependent society.

That, since numerous governmental activities administered by the State and local governments are related to national purpose and are financed in part

by Federal funds, a national interest exists in a high caliber of public service in State and local governments.

That the quality of public service at all levels of government can be improved by the development of systems of personnel administration consistent with such merit principles as—

(1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;

(2) providing equitable and adequate compensation;

(3) training employees, as needed, to assure high-quality performance;

(4) retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected;

(5) assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, or religious creed and with proper regard for their privacy and constitutional rights as citizens; and

(6) assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

That Federal financial and technical assistance to State and local governments for strengthening their personnel administration in a manner consistent with these principles is in the national interest. (Pub. L. 91–648, § 2, Jan. 5, 1971, 84 Stat. 1909.)

SHORT TITLE

Section 1 of Pub. L. 91–648 provided: "That this Act [which enacted this chapter and sections 3371–3376 of Title 5, amended section 1304(e)(1) of Title 5, repealed sections 1881–1888 of Title 7, section 869b of Title 20, and section 246(f) of this title, and enacted provisions set out as notes under section 3371 of Title 5] may be cited as the 'Intergovernmental Personnel Act of 1970'."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 4722, 4723, 4743 of this title.

Title 42, United States Code (1970), pp. 10703-10704:

§ 4702. Administration of authorities.

The authorities provided by this Act shall be administered in such manner as (1) to recognize fuly the rights, powers, and responsibilities of State and local governments, and (2) to encourage innovation and allow for diversity on the part of State and local governments in the design, execution, and management of their own systems of personnel administration. (Pub. L. 91–648, § 3, Jan. 5, 1971, 84 Stat. 1909.)

REFERENCES IN TEXT

This Act, referred to in the text, is Pub. L. 91–648, the Intergovernmental Personnel Act of 1970, for classification of which in the Code see Short Title note set out under section 4701 of this title.

Title 42, United States Code (1970), p. 10707:

§ 4728. Transfer of functions.

(a) Prescription of personnel standards on a merit basis.

There are hereby transferred to the Commission all functions, powers, and duties of—

(2) the Secretary of Labor under—

(B) section 503(a)(1) of Title 42;

(b) Powers and duties of Commission.

The Commission shall—

(1) provide consultation and technical advice and assistance to State and local governments to aid them in complying with standards prescribed by the Commission under subsection (a) of this section; and

(2) advise Federal agencies administering programs of grants or financial assistance as to the application of required personnel administration standards, and recommend and coordinate the taking of such actions by the Federal agencies as the Commission considers will most effectively carry out the purpose of this subchapter.

Title 42, United States Code (1970), p. 10290:

SUBCHAPTER V.—FEDERALLY ASSISTED PROGRAMS

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (Pub. L. 88–352, title VI, § 601, July 2, 1964, 78 Stat. 252.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2000d–1 of this title; title 39 section 410.

Title 20, Code of Federal Regulations (1976), pp. 934-935:

Subpart A—Approval, Certification and Findings With Respect to State Laws and Plans of Operation for Normal and Additional Tax Credit and Grant Purposes

§ 601.1 General.

State unemployment compensation laws are approved and certified as provided in section 3304 of the Internal Revenue Code of 1954; findings are made regarding reduced rates permitted by a State law (section 3303(a) of the Internal Revenue Code of 1954) and such laws are certified as provided in section 3303(b) of the Internal Revenue Code of 1954; findings are made regarding the inclusion of specified provisions (section 303(a) of the Social Security Act) in State laws approved under section 3304(a) of the Internal Revenue Code of 1954; findings are made whether the States have accepted the provisions of the Wagner-Peyser Act and whether their plans of operation for public employment offices comply with the provisions of said Act.

Normal and additional tax credit is given to taxpayers against taxes imposed by section 3301 of the Internal Revenue Code of 1954.

Grants of funds are made to States for administration of their employment security laws if their unemployment compensation laws and their plans of operation for public employment offices meet required conditions of Federal law. (Section 303 (a) of the Social Security Act; section 3304 (a) of the Internal Revenue Code of 1954; sections 6, 7 and 8 of the Wagner-Peyser Act.)

§ 601.2 Approval of State unemployment compensation laws.

States may at their option submit their unemployment compensation laws for approval (section 3304(a) of the Internal Revenue Code of 1954).

(a) *Submission.* The States submit to the Regional Administrator, Employment and Training Administration (RAETA) four copies of the State unemployment compensation law, properly certified by an authorized State official to be true and complete, together with a written request for approval.

(b) *Review of State law.* The RAETA reviews the State law and forwards three copies to the central office of the Employment and Training Administration with his comments. The central office reviews the RAETA's comments and analyzes the State law from the standpoint of the requirements of section 3304(a) of the Internal Revenue Code of 1954.

(c) *Approval.* The Secretary of Labor determines whether the State law contains the provisions required by section 3304 (a) of the Internal Revenue Code of 1954. If the State law is approved, the Secretary notifies the Governor of the State within 30 days of the submission of such law.

(d) *Certification.* On December 31 of each taxable year the Secretary of Labor certifies, for the purposes of normal tax credit (section 3302 (a) (1) of the Internal Revenue Code of 1954), to the Secretary of the Treasury each State the

law of which he has previously approved. (See also § 601.5.)

§ 601.3 Findings with respect to State laws and plans of operation.

For purposes of grants, findings are made regarding the inclusion in State unemployment compensation laws, approved under section 3304 (a) of the Internal Revenue Code of 1954, of provisions required by section 303 (a) of the Social Security Act (see § 601.2); findings are also made whether a State has accepted the provisions of the Wagner-Peyser Act and whether its plan of operation for public employment offices complies with the provisions of said act. For purposes of additional tax credit, findings are made regarding reduced rates of contributions permitted by the State law (section 3303 (a) (1) of the Internal Revenue Code of 1954).

So that the Secretary of Labor may be enabled to determine the status of State laws and plans of operation, all relevant State materials, such as statutes, executive and administrative orders, legal opinions, rules, regulations, interpretations, court decisions, etc., are required to be submitted currently.

(a) *Submission.* The States submit currently to the RAETA four copies of relevant State material, properly certified by an authorized State official to be true and complete.

(b) *Review.* The RAETA reviews the State material and forwards three copies to the central office with his comments. The central office reviews the material from the standpoint of its conformity with section 303 (a) of the Social Security Act, section 3303 (a) of the Internal Revenue Code of 1954; or the Wagner-Peyser Act, as the case may be. If questions are raised concerning such conformity, negotiations to resolve them are undertaken with State officials. Any questions then remaining unresolved are presented to the Secretary with appropriate recommendations. If a State plan of operation for public employment offices, and any amendment thereto, complies with the provisions of the Wagner-Peyser Act, the State agency is notified

of the approval of the plan or the amendment as the case may require.

(c) *Findings.* The Secretary makes findings as provided in the cited sections of the Federal law. In the event that the Secretary is unable to make the findings required for certification for payment or for certification of the law for purposes of additional tax credit, further discussions with State officials are undertaken.

Title 45, Code of Federal Regulations (1976), p. 934 *et seq.*:

PART 70—STANDARDS FOR A MERIT SYSTEM OF PERSONNEL ADMINISTRATION

Sec.

70.1 Purpose.
70.2 Jurisdiction.
70.3 Merit system organization.
70.4 Equal employment opportunity.
70.5 Employee-management relations.
70.6 Political activity.
70.7 Classification.
70.8 Compensation.
70.9 Recruitment.
70.10 Selection.
70.11 Appointment.
70.12 Career advancement.
70.13 Layoffs and separations.
70.14 Cooperation between merit systems.
70.15 Extension of merit system.
70.16 Personnel records and reports.

AUTHORITY: The provisions of this Part 70 issued under 29 U.S.C. 49d, 40 U.S.C. 484, 42 U.S.C. 246, 291d, 302, 503, 602, 639, 705, 1202, 1302, 1352, 1382, 1395hh, 1396a, 2674, 2684, 3023, 4573, 50 U.S.C. App. 2286.

SOURCE: The provisions of this Part 70 appear at 36 F.R. 4498, Mar. 6, 1971, unless otherwise noted.

§ 70.1 Purpose.

(a) These standards are promulgated by the Departments of Health, Education, and Welfare, Labor, and Defense to implement statutory and regulatory provisions requiring the establishment and maintenance of personnel standards

on a merit basis in the administration of various grant-in-aid programs.

(b) The development of proper and efficient administration of the grant-in-aid programs is a mutual concern of the Federal, State, and local agencies cooperating in the programs. Proper and efficient administration requires clear definition of functions, employment of the most competent available personnel, and development of staff morale and individual efficiency. The cooperative efforts of merit system and program agency personnel offices in providing comprehensive personnel programs are essential. Such programs provide for analyzing and classifying jobs; establishing adequate and equitable salary, fringe benefit, and retirement plans; projecting manpower needs and planning to meet them; developing effective recruitment, selection, placement, training, employee evaluation, and promotion programs; assuring equal opportunity and providing affirmative action programs to achieve that end; protecting employees from discrimination, arbitrary removal, and political pressures; conducting positive employee-management relations and communications; and providing research to improve personnel methods. Personnel programs must be planned and administered in a timely, expeditious manner to meet effectively program and merit system objectives.

(c) An integral part of the grant-in-aid programs is the maintenance by the State and local governments of a merit system of personnel administration for the grant-aided agencies. The Federal agencies are interested in the development and continued improvement of State and local merit systems but exercise no authority over the selection, tenure of office, or compensation of any individual employed in conformity with the provisions of such systems.

(d) Laws, rules, regulations, and policy statements to effectuate a merit system in accordance with these standards are a necessary part of the approved State plans required as a condition of Federal grants. Such laws, rules, regulations, policy statements, and amendments thereto, will be reviewed for substantial conformity to these standards. The administration of the merit system will likewise be subject to review for compliance in operation.

(e) Continuing application of these standards will give reasonable assurance of a proper basis for personnel administration, promote a career service, and result in increased operating efficiency and program effectiveness. Within these standards means are provided for the effectuation of national policies for structuring jobs and the training and employment of the disadvantaged.

(f) In order to assist State and local jurisdictions in maintaining their merit systems under these standards, technical consultative service will be made available.

Title 29, Code of Federal Regulations (1976), p. 159 *et seq.*:

PART 31—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF THE DEPARTMENT OF LABOR—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.

31.1 Purpose.
31.2 Definitions.
31.3 General standards.
31.4 [Reserved]
31.5 Compliance information.
31.6 Assurances required.
31.7 Conduct of investigations.
31.8 Procedure for effecting compliance.
31.9 Hearings.
31.10 Decisions and notices.
31.11 Judicial review.
31.12 Effect on other regulations; supervision and coordination.

AUTHORITY: The provisions of this Part 31 issued under sec. 602, 78 Stat. 252; 42 U.S.C. 501, 29 U.S.C. 49k, 5 U.S.C. 301.

SOURCE: The provisions of this Part 31 appear at 29 F.R. 16284, Dec. 4, 1964, unless otherwise noted.

§ 31.1 Purpose.

The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Labor.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DAVID P. WEINBERGER, pro se
Plaintiff

versus No. 76-200-Civ-CA

E. J. TROMBETTA, J. W. WHITE,
L. Y. PONDER, ET AL
Defendants

ORDER

Filed: Jun. 30, 1976

THIS CAUSE having come before the Court on motion by defendants to dismiss and the Court having considered the record in this cause, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that said motion is granted.

DONE AND ORDERED at Miami, Florida, this 29th day of June, 1976.

/s/ C. CLYDE ATKINS
UNITED STATES DISTRICT
JUDGE

cc: Pettigrew Arky Freed, et al
David P. Weinberger, Esq.

ORDER

[Caption Omitted]

Filed: Jul. 13, 1976

THIS CAUSE having come before the Court on motion of plaintiff for relief from order of dismissal and the Court having considered the record in this cause, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that said motion is denied.

DONE AND ORDERED at Miami, Florida, this 13th day of July, 1976.

/s/ C. CLYDE ATKINS
UNITED STATES DISTRICT
JUDGE

cc: Pettigrew Arky Freed, et al
David P. Weinberger, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3278
Summary Calendar*

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

EDWARD J. TROMBETTA, J. W. WHITE, SHELTON KEMP, ANN TODD, G. W. STUBBS, L. Y. PONDER, G. L. FOX, and T. J. DOWDELL, JR.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

(April 1, 1977)

BEFORE GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3278

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

EDWARD J. TROMBETTA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 1, 1977, 5 Cir., 197__, ___ F.2d ___).

(MAY 24, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active serv-

ice on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ PETER T. FAY
United States Circuit Judge

[Filed: May 24, 1977]

APPENDIX D

Title 28 [Judiciary and Judicial Procedure], United States Code (1975 Supplement, p. 2281), Section 455(a) as amended, Pub.L. 93-512, effective Dec. 5, 1974, 88 Stat. 1609:

§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy.

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28, United States Code (1970 ed., p. 7566), Section 1331:

§ 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

Title 28, United States Code (1970 ed., p. 7571), Section 1343 as corrected in 1975 Supplement, p. 2289:

§ 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 42 [Public Health & Welfare], United States Code (1970 ed., p. 10283), Section 1983:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, United States Code (1970 ed., p. 10283), Section 1985(3):

§ 1985. Conspiracy to interfere with civil rights.

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on

the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42, United States Code (1970 ed., pp. 10283-10284), Section 1986:

§ 1986. Same; action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may

recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 76-1303-Civ-CA

DAVID P. WEINBERGER, ESQ., pro se,)
Plaintiff,)
vs.)
UNITED STATES OF AMERICA,)
Defendant.)

FILED
SEP 30 1976
JOSEPH P. GIGART
CLERK, U. S. DIST. CT.
SOUTHERN DIST. OF FLA.
MIAMI, FLA.

ORDER

Defendant's motion to dismiss the complaint on the ground that the Court does not have jurisdiction over the subject matter, and on the ground that plaintiff has failed to state a claim against the defendant upon which relief may be granted having duly come on to be heard, and the Court having the record before it, and the Court being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED that the motion be, and the same hereby is granted, and the complaint is dismissed. See, e.g., Dalehite v. U.S., 346 U.S. 15 (1953). All other motions are denied as moot.

Done and Ordered in Chambers at Miami, Florida, this 30th day of September, 1976.

Lyde Atkins
UNITED STATES DISTRICT JUDGE

c.c. - U. S. Attorney (Northcutt)
- David P. Weinberger, Esquire

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE No. 76-1303-Civ-CA

DAVID P. WEINBERGER,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER DENYING PLAINTIFF'S
MOTION FOR REHEARING

Filed: Oct. 13, 1976

THIS CAUSE is before the Court on motion of plaintiff for rehearing. The motion is denied.

The grounds for dismissal are *inter alia:*

(1) lack of subject matter jurisdiction with respect to the Federal Tort Claims Act and

(2) Failure to state a claim upon which relief could be granted since the United States is under no legally enforceable duty vis-a-vis the movant.

DONE AND ORDERED at Miami, Florida this 13th day of October, 1976.

/s/ C. CLYDE ATKINS
United States District Judge

cc.
David Weinberger
William Northcutt-AUSA

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
EDWARD W. WADSWORTH, Clerk
OFFICE OF THE CLERK

June 24, 1977

TO COUNSEL OR PARTIES LISTED BELOW:

NO. 76-4365 — DAVID P. WEINBERGER, ESQ. vs. U.S.A.

Dear Counsel:

You are hereby notified that a panel of this Court, after due consideration and pursuant to Local Rule 18, has transferred the referenced case to the Summary Calendar for disposition.

Local Rule 18 states: "(a) Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar. (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the Clerk, pursuant to directions from the Court. (c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar."

Yours sincerely,
EDWARD W. WADSWORTH,
Clerk
/s/ MARY BETH BREAUX
Deputy Clerk

/mbb

cc: Mr. David P. Weinberger
Mr. Robert W. Rust and
Mr. William Northcutt

APPENDIX F

Title 28 [Judiciary and Judicial Procedure], United States Code (1970 ed., p. 7572), Section 1346(b):

§ 1346. United States as defendant.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code (1970 ed., p. 7676), Section 2680(a):

§ 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Local Rule 18, United States Fifth Circuit Court of Appeals [28 U.S.C.A., 1976-77 supplement at pp. 146-147]:

Rule 18. Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.

Rule 20, United States Supreme Court [Title 28, United States Code (1970 ed., p. 7687)]:

Rule 20. Certiorari to a court of appeals before judgment.

A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-2981

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

STATE OF FLORIDA, Department of Commerce,
Defendant-Appellee.

No. 76-3278

DAVID P. WEINBERGER,
Plaintiff-Appellant,

versus

EDWARD J. TROMBETTA, ET AL.,
Defendants-Appellees.

No. 76-4365

DAVID P. WEINBERGER, ESQ.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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ORDER:

IT IS ORDERED that appellant's motion to have the above causes considered by the same judicial panel is denied.

/s/ PETER T. FAY
UNITED STATES CIRCUIT JUDGE